

89-152

No. \_\_\_\_\_

Supreme Court, U.S.  
FILED

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

\_\_\_\_\_  
VERA M. ENGLISH,  
*Petitioner,*

v.

\_\_\_\_\_  
GENERAL ELECTRIC COMPANY,  
*Respondent.*

\_\_\_\_\_  
**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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#### **QUESTION PRESENTED FOR REVIEW**

Should an employee's well-recognized and well-founded state tort action that does not in any way address issues of nuclear regulation or safety, be preempted by Section 210 of the Energy Reorganization Act, 42 USC Section 5851, the so-called nuclear "whistleblowers" statute?

#### **LIST OF PARTIES**

The parties to the proceedings below are the petitioner Vera English and the respondent General Electric Company.

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**PETITION FOR WRIT OF CERTIORARI TO THE  
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**REPORT OF OPINIONS**

The Order of the District Court is reported at 683 F.Supp. 1006 (E.D.N.C. 1988). (Appendix, p. 6a) The Opinion of the Court of Appeals is reported at 871 F.2d 22 (4th Cir. 1989). (Appendix, p. 1a)

**JURISDICTION**

The Opinion of the Court of Appeals was decided and entered on April 3, 1989. A Petition for Rehearing and Suggestion for Rehearing *en banc* was denied and entered on April 28, 1989. (Appendix, p. 4a) Jurisdiction of this Honorable Court is invoked pursuant to 28 USC Section 1254(1).

**STATUTE INVOLVED**

Section 210 of the Energy Reorganization Act,  
42 U.S.C. § 5851. Employee protection

(a) Discrimination against employee

No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or appli-

cant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) —

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.].

(b) Complaint, filing and notification

(1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (hereinafter in this subsection referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint and the Commission.

(2) (A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint,

the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

(c) Review

(1) Any person adversely affected or aggrieved by an order issued under subsection (b) of this section

may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred. The petition for review must be filed within sixty days from the issuance of the Secretary's order. Review shall conform to chapter 7 of Title 5. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the Secretary's order.

(2) An order of the Secretary with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in any criminal or other civil proceeding.

(d) Jurisdiction

Whenever a person has failed to comply with an order issued under subsection (b) (2) of this section, the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.

(e) Commencement of action

(1) Any person on whose behalf an order was issued under paragraph (2) of subsection (b) of this section may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(2) The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

(f) Enforcement

Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of Title 28.

(g) Deliberate violations

Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.].

STATEMENT OF THE CASE

Vera English was born in the state of Maine in 1925. She grew up in that state, received training in the medical field, was certified as a licensed practical nurse, and worked there in the medical field for a number of years. She also received training in clinical medical laboratory technique and was certified as a medical technologist.

In 1960 Ms. English moved with her husband to Wilmington, North Carolina. From 1960 to 1972 she worked in a variety of laboratory positions in hospital and medical research facilities, as well as in the area of quality control for an aerospace firm making components for the Apollo project. During this period she received additional training and education in the field of chemistry and laboratory procedures. In November, 1972, she was hired by respondent General Electric to work in the Chemet Lab at its Wilmington Nuclear Fuels Manufacturing facility, performing chemical analyses to assure the quality of the materials in nuclear fuel rods.

Ms. English took her duties at General Electric very seriously. The radioactive materials that she was working with not only presented a substantial safety hazard to her and her co-workers, but also presented substantial potential hazards to the general public once it was incor-

porated into nuclear fuel rods. Being ever conscious and concerned about these hazards, Ms. English took seriously her legal obligations to report potential safety and quality problems to management and government authorities.

Prior to 1984 Ms. English had reported a number of safety and quality concerns both to respondent's management personnel as well as to government officials. Those complaints had been largely ignored and Ms. English had been disparaged and derided as paranoid for making such complaints. (Complaint paragraph 9) In February, 1984, Ms. English again reported safety hazards and illegal practices to representatives of the Nuclear Regulatory Commission as well as to management personnel. (Complaint paragraphs 10 & 12) Following these complaints Ms. English continued to observe lax safety procedures and substantial radiation contamination which other workers had repeatedly left about her workplace. (Complaint paragraphs 13, 14 & 15) As her complaints about worker contamination had been largely ignored by management, on March 10, 1984, Ms. English decided that the only way she could convince management personnel of the legitimacy of her concerns was to not clean up some of the contamination that other employees had left at her work station so that she could show it to her supervisor. As her supervisor would not be on duty with her until March 12, 1984, she marked off a portion of the contamination with red tape and left it, cleaning up the remainder of the contamination she had found. (Complaint paragraphs 16 & 17) As a result of Ms. English's complaints and her persistence, many of the safety concerns were ultimately addressed and contamination in the Chemet Lab was removed.

From the time that Ms. English marked the contamination on March 10, until she was able to show it to her supervisor on March 12th, several other shifts worked in the Chemet Lab. None of the employees on any of the

other shifts cleaned up the contamination or brought it to the attention of their supervisors. (Complaint paragraph 17) In spite of the fact that employees on at least two other shifts had observed the contamination and failed to clean it up, no action of any kind was undertaken by respondent with respect to any workers on those shifts. (Complaint paragraph 27)

On March 15, 1984, Ms. English was falsely charged by respondent with five violations of company or NRC requirements. (Complaint paragraph 19) At that time she was removed from the Chemet Lab under guard as if she were a criminal. (Complaint paragraph 24(a)) After an internal company appeal, all charges against Ms. English were dropped except the claim that she failed to clean up radiation contamination. (Complaint paragraph 21) On the strength of that one allegation, and without taking disciplinary action against other workers who had failed to clean up the same contamination, Ms. English was permanently removed from her quality-control position in the Chemet Lab, barred from any controlled area, and given a menial "make-work" position in another building on site. (Complaint paragraph 21)

The respondent further advised Ms. English that she would have to bid for any suitable position in the plant that became available in a non-controlled area, and that if she did not obtain such a position within 90 days, she would be discharged. As no such position became available within the time limits set by respondent, Ms. English was discharged on July 30, 1984. (Complaint paragraphs 25 & 26) During a period of at least three and a half months leading up to her discharge, Ms. English was never given any meaningful work, subjected to requirements and "rules" that were not applied to other employees, placed under constant surveillance by management, and completely isolated from her fellow employees to the point of not even being allowed to eat her lunch in

the company lunch room with fellow workers. (Complaint paragraphs 5, 21(c), 24(b), 24(c) & 26)

As a result of respondent's treatment of Plaintiff before her discharge, Ms. English suffered and continues to suffer from a severely depressed and emotional condition. (Complaint paragraphs 36, 37 & 38) Although she has made diligent efforts to find other comparable employment, her efforts have been unsuccessful causing her substantial financial difficulties. (Complaint paragraph 35)

This action was filed on March 13, 1987, in the United States District Court for the Eastern District of North Carolina. It is a diversity action in which Ms. English asserted tort claims under North Carolina law for wrongful discharge and intentional infliction of emotional distress. Ms. English also asserted claims for punitive damages associated with each of the two tort claims.<sup>1</sup>

Prior to the filing of an answer, Ms. English amended her complaint to slightly modify paragraphs 7 and 42.

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<sup>1</sup> The complaint in this case was filed following an administrative proceeding in which an Administrative Law Judge issued a decision favorable to Ms. English on August 1, 1985. A copy of that decision is included in the Appendix to this Petition. The Secretary of Labor subsequently reversed that decision on the grounds that Ms. English's complaint was untimely. That decision was appealed to the Fourth Circuit, which affirmed the ruling of "untimeliness", but remanded the case for a ruling by the Secretary on the question of whether Ms. English might be entitled to establish a claim on the theory of continuing violation. *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988). That issue is currently before the Secretary and has been briefed by the parties.

Essentially concurrent with the DOL proceeding, Ms. English filed a petition with the Nuclear Regulatory Commission under 10 CFR Part 2.206, asking that penalties and damages be assessed against General Electric. The NRC has recently issued an order in that matter, citing General Electric for penalties, but rejecting any compensation for Ms. English. That decision is also contained in the Appendix to this Petition.

On or about May 5, 1987, without filing an answer, respondent moved to dismiss the Complaint pursuant to Federal Rules 12(b)(1) and 12(b)(6). On May 7, 1987, respondent similarly moved to dismiss the Amended Complaint.

On February 12, 1988, the Honorable F.T. Dupree, Jr., entered an Order ruling on respondent's motion. In that Order Judge Dupree concluded that Ms. English had not stated a good cause of action for wrongful discharge, and granted petitioner's motion pursuant to Rule 12(b)(6) with respect to that claim (Appendix, p. 25a); however, Judge Dupree concluded that Ms. English *had* stated a good cause of action for intentional infliction of emotional distress, and denied respondent's Rule 12(b)(6) motion with respect to that claim. (Appendix, p. 27a) Judge Dupree also analyzed the impact of Section 210 of the Energy Reorganization Act, 42 USC Section 5851, and concluded that that provision was an exclusive remedy for Ms. English, preempting all of her state tort claims. He therefore granted respondent's motion pursuant to Rule 12(b)(1) with respect to both tort claims. (Appendix, p. 29a)

From this Order and Judgment Ms. English filed a timely notice of appeal to the Fourth Circuit Court of Appeals, pursuing an appeal solely with respect to her claim for intentional infliction of emotional distress; respondent cross-appealed.

On April 3, 1989, the Fourth Circuit issued its decision in this matter. It rejected respondent's cross-appeal and affirmed the ruling that Ms. English had stated a good cause of action for intentional infliction of emotional distress. However, the Court also affirmed the ruling that Ms. English's state tort claim was preempted by the "whistleblower" provisions of the Energy Reorganization Act, 42 USC Section 5851.

On April 14, 1989, Ms. English filed a timely Petition for Re-Hearing with the Fourth Circuit. By order of April 28, 1989, that Petition was denied. (Appendix, pp. 4a-5a)

#### REASONS WHY THE WRIT SHOULD BE GRANTED

A. The Decision Below Conflicts With The Respect For The Rights Of States As Reflected In *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290. (1977), *Lingle v. Norge Division of Magic Chef*, 486 U.S. — (1988) and *San Diego Building Trades Council v. Garmon*, 359 U.S. 276 (1959).

A cause of action for intentional infliction of emotional distress was first expressly recognized by North Carolina courts in *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611, 623 (1979), a case involving the breach of a separation agreement. While *Stanback* may have been the first case that expressly recognized the claim, the court discussed in detail earlier cases that clearly were grounded in such a theory (254 S.E.2d at 622). In *Kirby v. Jules Chain Stores Corp.*, 210 N.C. 808, 188 S.E. 625 (1936), the defendant's collection agent verbally abused plaintiff in a "profane and malicious manner" on at most two occasions. These actions were found sufficient to create a claim. Similarly, in *Crews v. Provident Finance Co.*, 271 N.C. 684, 157 S.E.2d 381 (1967), the plaintiff alleged that she was verbally abused on one occasion by a collection agent, and she became angry and upset as a result of this single instance of abuse. Again, these facts were sufficient to support her claims.<sup>2</sup> Thus claims like those

<sup>2</sup> At least part of these holdings seem to rely on the particular condition or susceptibility of the plaintiff. In *Kirby* the plaintiff was seven months pregnant at the time she was verbally abused. In *Crews* the plaintiff was apparently susceptible to angina attacks and did suffer such an attack as a result of the abuse. The condition or "susceptibility" of Ms. English supports her claim that Defendant's actions towards her were highly outrageous. In the hearing before the Administrative Law Judge, General Electric contended "... that Ms. English was a high strung, nervous

made by Ms. English have been recognized by North Carolina courts for more than 50 years.

The concern of North Carolina addressed through a tort action for intentional infliction of emotional distress is to prevent maliciously destructive and disruptive conduct towards North Carolina's citizens. As stated by Judge Phillips in *Woodruff v. Miller*, 64 N.C.App. 364, 307 S.E.2d 176, 178 (1983):

Fortunate it is for our people and society that such maliciously destructive and disruptive conduct is regarded as extreme and outrageous—rather than normal and acceptable—and that our law provides an orderly way for the community to disapprove of it and compensate those victimized by it.

As recognized by Judge Dupree and affirmed by the Fourth Circuit, this same type of claim, addressing the same state concern about conduct towards its citizens, has been recognized by the North Carolina courts in the employment situation. *Dixon v. Stuart*, 85 N.C.App. 338, 354 S.E.2d 757 (1987). It is such outrageous conduct of respondent towards Ms. English that violates North Carolina's strong state interest in providing Ms. English with the remedy she is attempting to address in the present action.<sup>3</sup>

The decision below conflicts with this Court's unanimous decision in *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977), that a tort action for in-

woman with marked and emotional reactions . . ." (Appendix, p. 41a), and "... that Complainant was an unusually excitable individual. . .". (Appendix, p. 42a) Thus respondent certainly had knowledge that Ms. English would be susceptible to the harassment, surveillance and ridicule that it directed towards her, thereby making its actions even more outrageous. Hence, Ms. English's claim for punitive damages—which even the district court acknowledged was not a form of remedial relief available under the whistleblower provisions of section 210 (Appendix, at p. 18a)—was well stated in her tort complaint.

<sup>3</sup> As found by the Administrative Law Judge, Ms. English was subjected to an "inquisition". (Appendix, p. 43a)

tentional infliction of emotional distress is not preempted by the National Labor Relations Act. *Farmer* indicates that a court should examine the state's interest in regulating the conduct in question, when considering a question of preemption. 430 U.S. 297. In addition, the decision recognizes the importance of regulating outrageous conduct, as North Carolina does in the tort of infliction of emotional distress.

Regardless of whether the operation of the hiring hall was lawful or unlawful under federal statutes, there is no federal protection for conduct . . . which is so outrageous that "no reasonable man in a civilized society should be expected to endure it." Thus . . . permitting the exercise of state jurisdiction over such complaints does not result in state regulation of federally protected conduct.

430 U.S. at 302 (citations omitted). The same concerns expressed by this Court in *Farmer* apply in the present case.

Judge Dupree concluded that Section 210 of the ERA, by itself, constitutes a scheme so pervasive and comprehensive with respect to nuclear workers' protection that it preempts state tort actions of whatever sort. Appendix, p. 22a) Plaintiff does not agree with this conclusion, and asserts that the legislative history does not support it. But even if Judge Dupree is correct, *Farmer* clearly allows a state to supplement the federal remedies, given a compelling state interest, and as long as such "supplementation" does not conflict with the federal statute. Judge Dupree recognized that such an exception to preemption existed under *Farmer*, but rationalized that *Farmer* did not apply primarily because there was an overlapping of state and federal remedies:

In this action, plaintiff has a federal remedy in Section 210. That Section specifically addresses "other discrimination" and provides for compensatory damages in the case of a violation."

(Appendix, p. 28a)

However, Judge Dupree's rationale has been specially rejected by this Court's recent decision in *Lingle v. Norge Division of Magic Chef*, 486 U.S. —, 100 L.Ed.2d 410 (1988) (Decided after Judge Dupree's decision in this case). The issue in *Lingle* was whether a state action for wrongful discharge was preempted by the National Labor Relations Act. There was almost total overlap of the damages available to the plaintiff in *Lingle*; and in fact, at the time the case was heard by this Court, plaintiff had filed a grievance under the collective bargaining agreement and had already received full back pay and reinstatement through that proceeding. 486 U.S. at —, 100 L.Ed.2d at 416. Those factors notwithstanding, this Court concluded that the state action constituted a "separate font" of substantive rights that were not preempted by federal law. 486 U.S. at —, 100 L.Ed.2d at 422. For similar reasons, *Lingle* would require reversal of the decision below to afford Ms. English the right to pursue her separate, non-federal claims.

This Court has consistently expressed deference to the concerns and enactments of the states, finding preemption only where Congress has clearly and expressly occupied the entire field, or where there is an actual conflict with federal law. This respect for the rights of the states has been especially evident in the employment area.<sup>4</sup> As this Court has stated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959):

<sup>4</sup> See, e.g., *Automobile Workers v. Russell*, 356 U.S. 634 (1958) (State action for assault not preempted.); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966) (State action for malicious libel not preempted.); *Sears Roebuck Co. v. Carpenters*, 436 U.S. 180 (1978) (State action for trespass not preempted.); *Belknap v. Hale*, 463 U.S. 491 (1983) (Common law action for fraud and breach of an employment contract not preempted.); *Fort Halifax Packing Company v. Coyne*, 482 U.S. —, 96 L.Ed.2d 1 (1987) (State statute requiring employers to provide severance pay to employees in the event of a plant closing, not preempted by ERISA or NLRA.).

Due regard for the presuppositions of our embracing federal system, including the principle of the diffusion of power not as a matter of doctrinaire localism but as a matter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the federal regulation.

Outrageous conduct inflicting severe emotional distress was, at best, a peripheral concern of Section 210 of the ERA. Under the decisions of this Court, North Carolina should not be precluded by Section 210 from protecting its citizens from such conduct, and Ms. English should be allowed to proceed to trial on her state tort claims.

**B. The Decision Below Conflicts With The Holding Of This Court In *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987).**

The lower court preempted state tort law on the ground that there was an "irreconcilable conflict between the federal and state standards" concerning employee relations at commercial nuclear facilities, and that this conflict would "frustrate the objectives of federal law." (Appendix, p. 19a) In making these findings the lower court turned the law of federal preemption on its head.

The lower court essentially looked at the language of Section 210 of the Energy Reorganization Act, and particularly at 42 USC Section 5851(g), and articulated three hypothetical circumstances in which Section 210 and state law might possibly conflict. But nothing in the record supported a finding that such conflicts actually existed—particularly since this matter was before the court on a Rule 12(b)(6) motion. Hence, the holding below that Ms. English's claims were preempted was based solely on the hypothetical possibility that state-federal conflicts may exist; and that approach was contrary to the legal standard which should have been applied.

In *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987) this Court articulated the correct standard for applying such hypothetical reasoning to preemption cases:

"To defeat Granite Rock's facial challenge [that the Coastal Commission's actions were preempted], the Coastal Commission *needed merely to identify a possible set of permit conditions not in conflict with federal law.*" )

480 U.S., at 593 (Emphasis added).

Hence, the party attempting to find preemption may not rely on hypothetical circumstances to justify preemption; rather, to defeat a preemption challenge a party need only "identify a possible" set of "conditions *not* in conflict with federal law." The standard enunciated in *California Coastal Commission* provides the only logical rationale. Since hypothetically virtually every state law could be arguably found to conflict with federal law, the decision below invites imaginative preemption advocates to create bases for totally engulfing and abolishing states' rights.

Thus, under the rationale and ruling of the lower court that Section 210 is the exclusive remedy for employees at General Electric's fuel processing plants, those employees are now presumably denied any of the protections of the following North Carolina statutes:

N.C.Gen.Stat. Section 143-422.2

prohibition against discrimination in employment on the basis of race, religion, color, national origin, age or sex.

N.C.Gen.Stat. Section 97-6.1

protection from retaliation for filing a worker's compensation claim.<sup>5</sup>

<sup>5</sup> In *Lingle, supra*, this Court expressly disallowed a company's preemption defense, and authorized a worker's state compensatory and punitive damage action to proceed, where the claimed basis for the worker's tort damages were bottomed on a comparable provision

N.C.Gen.Stat. Section 95-130 (8)

protection from retaliation for filing a complaint under the North Carolina Occupational Safety and Health Act.

N.C.Gen.Stat. Section 95-25.20

protection from retaliation for filing a complaint under the North Carolina Wage and Hour Act.

N.C.Gen.Stat. Sections 96-15.1 and 15.2

protection from retaliation for being a witness in an unemployment compensation hearing.

N.C.Gen.Stat. Chapter 168A

protection from discrimination in employment on the basis of being handicapped.

While the lower court's decision does not expressly preempt the state laws cited above, the rationale of that decision certainly compels such a conclusion. As noted, it is an easy task to construct hypothetical situations involving each of these state statutes that might possibly conflict with the provisions of Section 210 of the ERA, and thus support preemption under the lower court's ruling. Indeed, there is certainly nothing to clearly distinguish the preemption of Petitioner's state tort claim for intentional infliction of emotional distress, from each of these state statutes affecting the employer-employee relationship.

We stress that there are no *facts* on the record in this case which actually show that Ms. English's claims conflict with, or would in any way frustrate, the purposes of any federal law. As this Court stated in *California Coastal Commission*:

... we hold only that the barren record of this facial challenge has not demonstrated any conflict. We do not, of course, approve any future application of the Coastal Commission permit requirement that *in fact* conflicts with federal law.

480 U.S. 594 (emphasis added).

of Illinois law protecting workers against retaliatory discharge for filing worker's compensation claims.

The important power of the states to articulate their own body of law should not be discarded on the mere possibility that a facial challenge could be made, or that a court might interpret state law in such a manner as to conflict with federal law. The courts of North Carolina must be free to develop their own tort law in cases such as this. Federal courts, sitting in diversity, can reasonably predict the rules of law that the courts of North Carolina will adopt. And given the strong recognition that North Carolina's courts have afforded to claims of infliction of emotional distress in fashioning the state's tort remedies, the court below should have given cognizance, as well as equal accommodation, to both the Supremacy Clause of the U.S. Constitution and the law of the State of North Carolina, and found that Ms. English's tort claims do not irreconcilably conflict with 42 USC section 5851 (g).

**C. The Decision Below Conflicts With The Holding Of This Court In *Decanas v. Bica*, 424 U.S. 351 (1976).**

*Decanas* was an action to enforce a California statute prohibiting the employment of undocumented alien farmworkers. The issue before the Court was whether the state statute was preempted by the Immigration Act. The argument for preemption was especially strong in this situation as the "Power to regulate immigration is unquestionably exclusively a federal power." 424 U.S. at 354.

In upholding the California statute, this Court recognized that "States possess broad authority . . . to regulate the employment relationship to protect workers within the State." 424 U.S. at 356. Thus this Court concluded that the statute was valid, even in the face of the unequivocally exclusive federal power in the area of immigration, and ". . . even if such local regulation has some purely speculative and indirect impact on immigration . . ." 424 U.S. at 355.

As set forth above, North Carolina has recognized the tort of infliction of emotional distress in the employment situation. *Dixon, supra*. North Carolina has done so to protect its citizens and workers from outrageous conduct by employers. The protection of North Carolina's workers from such outrageous conduct is surely of sufficient concern to bring it within the "broad authority" of the State recognized by this Court in *Decanas*; and certainly beyond an assault based solely on some purely speculative and indirect impact on Section 210 of the ERA.

The court in *Decanas* also indicated that in the context of the employment relationship, considerable deference should be given to the power and rights of states, and that preemption is required in only the most clear and extreme cases:

Only a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal laws—was "the clear and manifest purpose of congress" would justify that conclusion.

424 U.S. at 357 (citation omitted). Hence, as there is nothing to show such a "clear and manifest purpose" to oust state power in the area of state damage actions based on state tort laws, the decision below should be reversed and Ms. English's claim for emotional distress should be allowed to proceed to trial.

**D. The Decision Below Conflicts With This Court's Decision In *Pacific Gas and Electric Co. v. Energy Resources Commission*, 461 U.S. 190 (1981), And *Silkwood v. Kerr McGee Corp.*, 464 U.S. 238 (1984).**

The two cases decided by this Court in the field of atomic energy confirm that Ms. English's claim for infliction of emotional distress is not preempted.

*Pacific Gas and Electric v. Energy Resources Commission*, 461 U.S. 190 (1983), required this Court to

determine whether the Atomic Energy Act preempted state law prohibiting the certification of new nuclear plants until a technology for the disposal of nuclear wastes existed. In analyzing that question, this Court concluded that the federal government has preempted the entire field of nuclear safety, preventing any state regulation or "supplementation" of that field. 461 U.S. at 212. At the same time, the Court found that where state (California) legislation relating to the nuclear industry had an economic, rather than nuclear safety purpose, such state law was not preempted. 461 U.S. at 216. The argument that the state statute conflicted with the federal statutes and regulations was also rejected, because compliance with both the state and federal statutes was possible. 461 U.S. at 219.

Likewise in *Silkwood v. Kerr McGee*, 464 U.S. 238 (1984), this Court upheld a state tort action for damages arising out of exposure to radiation as a result of inadequate nuclear safety procedures. In spite of the implication of nuclear safety issues in *Silkwood*, and the complete federal preemption of that field recognized in *Pacific Gas and Electric, supra*, this Court concluded that a state claim for compensatory or punitive damages was not preempted. The conclusion was that preemption would exist only if a very stringent test were met:

... preemption should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damage action would frustrate the objectives of the federal law.

464 U.S. at 256.

Judge Dupree correctly concluded in the decision below that Section 210 is not a statute regulating nuclear safety concerns, and thus absolutely "preempting" under

*Pacific Gas and Electric*, but one primarily focused on employee protection and employee-employer relations. (Appendix, p. 19a) Yet he found preemption based on inference: that Section 210 *itself* is a scheme of regulation "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." (Appendix, pp. 22-23a) And Judge Dupree then built upon this inferential conclusion by hypothesizing "conflicts" between Section 210 and the state action, to meet the *Silkwood* requirement of an "irreconcilable conflict" between state and federal standards. (Appendix, pp. 19-22a)

The conflicts hypothesized by Judge Dupree cannot support a claim of preemption under this Court's decisions. Given that North Carolina's action for infliction of emotional distress is concerned with regulating outrageous conduct toward its citizens (*Woodruff, supra*), and has nothing whatsoever to do with regulating nuclear power or nuclear safety, it is clear that, under *Pacific Gas and Electric* and *Silkwood*, a case for preemption does not exist.

**E. There Is Conflict Among The Courts Concerning The Preemption Of State Claims By Federal Employment Statutes.**

This Court should grant this Petition and take jurisdiction of this case to provide guidance to state and federal courts on the issue of preemption of state claims by federal "whistle-blowers" and in the employment relations contexts.

Section 210 is not the only federal "whistleblower" statute. There are at least seven such statutes, having similar and often identical provisions. Kohn, *Protecting Environmental and Nuclear Whistleblowers* (1985). De-

cisions on the issue of preemption under these various acts are conflicting, requiring guidance from this Court to bring some order and uniformity in this area. Likewise, decisions on the issue of preemption under the NLRA suggest a conflict with the decision below, also requiring this Court's guidance.

With respect to Section 210, two federal district courts and two state supreme courts addressed the issue of preemption in reported decisions prior to the publication of the decision in this case. In *Stokes v. Bechtel North American Power Corp.*, 614 F.Supp. 732 (N.D.Cal. 1985), the court concluded that a state wrongful discharge claim was not preempted by Section 210. However, in *Snow v. Bechtel Construction*, 647 F.Supp. 1514 (C.D.Cal. 1986), the court concluded that a state claim for wrongful discharge was preempted.

In *Wheeler v. Caterpillar Tractor Co.*, 108 Ill.2d 502, 485 N.E.2d 372 (1985), *cert. den.*, 475 U.S. 1122 (1986), the Illinois Supreme Court concluded that a state wrongful discharge claim was not preempted by Section 210. The Kansas Supreme Court has recently reached a contrary conclusion. *Chrisman v. Phillips Industries, Inc.*, 242 Kan. 772, 751 P.2d 140 (1988).

The four decisions just cited all involved claims for wrongful discharge, not other common law torts. The present case is the only case of which Petitioner is aware where essentially all forms of state torts were deemed preempted by Section 210. In contrast, *Norris v. Lumberman's Mutual*, 687 F.Supp. 699 (Mass. 1988), concluded that while retaliatory discharge claims were preempted by Section 210, a claim for tortious interference with contract could proceed.

The decision below also conflicts with the rationale and general trend in cases arising in the employer-employee, labor relations context. Thus a number of courts have held, in contrast to Judge Dupree's and the Fourth Cir-

cuit's decision in this matter, that claims based on state statutes or torts are not preempted. *See, e.g., Baldracchi v. Pratt & Whitney*, 814 F.2d 102 (2nd Cir. 1987) (Retaliation claim under Connecticut workers' compensation law not preempted.); *Keehr v. Consolidated Freightways*, 825 F.2d 133 (7th Cir. 1987) (Claims for invasion of privacy and infliction of emotional distress not preempted.); *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857 (9th Cir. 1987) (Action for wrongful discharge founded on state occupational safety and health law not preempted.); *Local No. 57 v. Bechtel Power Corp.*, 834 F.2d 884 (10th Cir. 1987) (Blacklisting claims under state law not preempted.); *Miller v. AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988) (Claim for discrimination under state handicapped law not preempted.); *Smolarek v. Chrysler Corp.*, 858 F.2d 1165 (6th Cir. 1988) (Claims for handicapped discrimination under state law and retaliatory discharge not preempted.); and *Merchant v. American Steamship Co.*, 860 F.2d 204 (6th Cir. 1988) (Wrongful discharge claim not preempted.).

### CONCLUSION

Two different federal administrative agencies have concluded that Ms. English was treated outrageously and unfairly by General Electric, yet she has received no compensation for the very serious wrongs she has suffered. As set forth above, the decisions below are inconsistent with this Court's decisions on preemption generally, and more specifically with its decisions in the area of employment relations. For the reasons set forth above, Petitioner respectfully requests that the Court grant this Petition and issue its writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review the opinion of that court in Petitioner's case.

Respectfully submitted this the 27th day of July, 1989.

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## **APPENDIX**

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APPENDIX

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 88-3976

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VERA M. ENGLISH,  
*Plaintiff-Appellant*  
versus

GENERAL ELECTRIC COMPANY,  
*Defendant-Appellee*

GOVERNMENT ACCOUNTABILITY PROJECT,  
*Amicus Curiae*

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No. 88-3982

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VERA M. ENGLISH,  
*Plaintiff-Appellee*  
versus

GENERAL ELECTRIC COMPANY,  
*Defendant-Appellant*

GOVERNMENT ACCOUNTABILITY PROJECT,  
*Amicus Curiae*

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Appeal from the United States District Court  
for the Eastern District of North Carolina, at Wilmington  
Franklin T. Dupree, Jr,  
Senior District Judge—(CA-87-31-7-CIV)

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Argued: December 5, 1988

Decided: April 3, 1989

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Before RUSSELL, WIDENER, and HALL, Circuit  
Judges.

---

M. Travis Payne (EDELSTEIN AND PAYNE; Mozart G. Ratner, on brief) for Appellant/Cross-Appellee. Peter G. Nash (Diane L. Atwater, OGLETREE, DEAKINS, NASH, SMOAK AND STEWART; William W. Sturges, WEINSTEIN & STURGES, on brief) for Appellee/Cross-Appellant. (Stephen M. Kohn, Michael D. Kohn, GOVERNMENT ACCOUNTABILITY PROJECT, on brief) for Amicus Curiae.

PER CURIAM:

In this diversity action, Vera M. English appeals the district court's order dismissing her complaint on the ground that her state tort claim was preempted by federal law. The defendant, General Electric Company ("G.E."), cross-appeals from the district court denial of its motion to dismiss English's claim on the alternative ground that such claim failed to state a cause of action under North Carolina law. Finding no error, we affirm.

English was employed by G.E. as a laboratory technician at a nuclear fuel production facility in North Carolina. In February, 1984, she complained to both the Nuclear Regulatory Commission ("NRC") and her supervisors at the G.E. facility regarding what she believed to be serious violations of NRC safety standards. When no corrective action was taken, she deliberately failed to clean up radiation contamination at her work station in an effort to prove to her supervisor that such contamination was not being detected by the facility's safety inspectors. Although her efforts led to corrective action, she was disciplined by the company for her failure to clean up contamination of which she was aware. It is the measures allegedly taken by G.E. to discipline her that formed the basis for her tort claim of intentional infliction of emotional distress.<sup>1</sup>

<sup>1</sup> English's complaint also included a state tort claim for wrongful discharge; she has not, however, appealed the district court's dismissal of this claim.

The district court held that English had, under North Carolina law, stated a good cause of action for the tort of intentional infliction of emotional distress. However, the court further determined that the "whistleblower" provisions of the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851, were intended by Congress to constitute the sole remedy for nuclear facility employees who allege discrimination resulting from safety complaints and, therefore, English's state claim was preempted by the federal statute. On appeal, English contends that the lower court erred in ruling that Congress intended to foreclose whistleblowers from state tort remedies. In its cross-appeal, G.E. contends that English's allegations did not amount to the tort of intentional infliction of emotional distress and therefore, that the court erred in denying G.E.'s motion to dismiss on the alternative Fed. R. Civ. P. 12(b)(6) ground.

Upon full consideration of the record, briefs, and oral argument, we conclude that the lower court correctly determined that English stated a claim but that the claim was preempted by the ERA's "whistleblower" provisions. The district court's opinion has correctly identified and applied the relevant federal and state law. We therefore affirm the order dismissing the complaint for the reasons expressed by the district court. *English v. General Electric Co.*, 683 F. Supp. 1006 (E.D. N.C. 1988).<sup>2</sup>

*Affirmed*

<sup>2</sup> We have also had occasion to examine English's claim in the context of a complaint filed with the United States Department of Labor pursuant to the ERA's whistleblower provisions. On appeal to this court from the agency's dismissal of her claim as being time-barred, we held that a claim for "retaliatory harassment" is cognizable under the ERA and that compensatory damages are available. The case was remanded to the Secretary of Labor for consideration of English's retaliatory harassment claim. *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988).

4a

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 88-3976

---

VERA M. ENGLISH,  
*Plaintiff-Appellant*  
v.

GENERAL ELECTRIC COMPANY,  
*Defendant-Appellee*  
GOVERNMENT ACCOUNTABILITY PROJECT,  
*Amicus Curiae*

---

No. 88-3982

---

VERA M. ENGLISH,  
*Plaintiff-Appellee*  
v.

GENERAL ELECTRIC COMPANY,  
*Defendant-Appellant*  
GOVERNMENT ACCOUNTABILITY PROJECT,  
*Amicus Curiae*

---

On Petition for Rehearing with Suggestion  
for Rehearing In Banc

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5a

ORDER

[Filed April 28, 1989]

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The appellant/cross-appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and as the panel considered the petition for rehearing and is of the opinion that it should be denied, IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Hall, with the concurrence of Judge Russell and Judge Widener.

For the Court,

/s/ John M. Greacen  
Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF  
NORTH CAROLINA  
WILMINGTON DIVISION

---

No. 87-31-CIV-7

---

VERA M. ENGLISH,

*Plaintiff*

vs.

GENERAL ELECTRIC COMPANY,

*Defendant*

---

ORDER

[Filed Feb. 12, 1988]

Plaintiff, Vera M. English, filed this diversity action against defendant, General Electric Company (GE), alleging common law causes of action for wrongful discharge in violation of public policy and intentional infliction of emotional distress. As relief plaintiff seeks \$1,328,645 in compensatory damages and punitive damages in the amount of five percent of the net worth of defendant GE (or approximately \$2.3 billion). The action is before the court on defendant's motion pursuant to Rule 12 of the Federal Rules of Civil Procedure to dismiss the instant complaint on the grounds that the alleged causes of action are preempted by federal law such that the court lacks jurisdiction over the subject matter and the plaintiff has failed to state causes of action under North Carolina law upon which relief can be granted. F.R.Civ.P. 12(b) (1) and (6). For the rea-

sons which follow, defendant's motion pursuant to Rule 12(b) (1) as to the entire complaint will be granted. Further, defendant's 12(b) (6) motion will be granted as an alternative basis for dismissal only as to plaintiff's claim for wrongful discharge.

When confronted by a motion to dismiss a complaint must be construed in the light most favorable to the plaintiff and its allegations taken as true. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). The factual allegations upon which defendant GE's motion to dismiss must be resolved, as taken from the complaint, are as follows:

# I. FACTUAL ALLEGATIONS

From November 13, 1972 until March 15, 1984, plaintiff English was employed as a radiation laboratory technician in the Chemical Metallurgical Laboratory (Chemet Lab) of defendant's GE's Nuclear Fuel Manufacturing Department (NFMD) in Wilmington, North Carolina. At the NFMD nuclear fuel is produced using radioactive materials, principally uranium. As a source of quality control the Chemet Lab performs metallurgical, environmental, chemical and spectrographic analyses on small uranium samples to assure that standards of the Nuclear Regulatory Commission (NRC) are met. Plaintiff's job consisted of assuring an accurate measure of uranium in GE's uranium powder fuel pellets.

In February 1984 plaintiff began taking action to correct what she perceived as serious violations of safety standards at GE's NFMD. On February 13, 1984, plaintiff reported to the NRC that many safety hazards and illegal practices were present in the Chemet Lab, and that corrective action had not been taken even though

GE had been made aware by her of similar hazards and practices in the Lab. On February 24, 1984, plaintiff forwarded essentially the same complaints to Mr. E. A. Lees, the Quality Assurance Manager (later General Manager) of GE's NFMD.

During the period of March 5-9, 1984, plaintiff spent considerable work time cleaning up radiation contamination at and around her work station, apparently left there by workers on preceding shifts. On March 5 plaintiff asked a "Rad Safety" man (specifically trained personnel who, using special instruments, detect uranium contamination) to check out her work area to see whether he would discover the pile of contaminated nuclear materials she had collected and swept to the rear of her work table. The man declared plaintiff's area free of contamination. At the end of her shift plaintiff cleaned up the pile of contaminated matter which the Rad Safety man had not detected. At the conclusion of her work shift on March 10 plaintiff:

decided that the only way to convince management of the validity of her concerns about the dangerous conditions in the Chemet Lab and of other workers' failure[s] to follow safety procedures, charges she had raised before without GE properly responding, was to identify some of the areas of radiation contamination with red tape (used to mark off radiation hot spots) and have her regular supervisor, Mr. William Lacewell, see the conditions when he and she were next on duty, which would be on the evening of March 12.

#### Complaint ¶ 16.

Upon beginning her shift on March 12, 1984, English showed her supervisor the marked-off areas of contamination, areas which were undisturbed by interim shift workers. Plaintiff also informed her supervisor of the Rad Safety man's failure to detect contamination on her

work bench on March 5. Following plaintiff's discussion parts of the Chemet Lab were shut down whereby many of the safety problems identified by English were fixed and the contaminated areas were cleaned.<sup>1</sup> *Id.* ¶ 18.

In a letter dated March 15, 1984, GE charged plaintiff with several violations of GE and/or NRC requirements, including: (1) unauthorized removal of a personal nuclear survey instrument from the entrance to the laboratory for use elsewhere in the plant; (2) deliberate contamination of a table; (3) failure to clean up contamination, knowing it existed; (4) the continued distraction of other laboratory employees; and (5) disruption of normal laboratory activities. Plaintiff alleges that "GE management conspired to fraudulently charge that Mrs. English violated GE safety rules and criminal statutory prohibitions which they knew did not exist or the violation of which they knew did not occur." *Id.* ¶ 31. According to English, all charges save No. 3 were dropped "because they were deemed demonstrably false or not capable of substantiation." *Id.* ¶ 20. As punishment for charge No. 3, GE removed plaintiff from the Chemet Lab under guard "as if she were a criminal[,] exposing her to the contempt and ridicule of fellow employees," *id.* ¶ 24; barred her entry into the Chemet Lab or from employment in or entry to any controlled areas in the NFMD, *id.* ¶ 21; and indefinitely assigned her to menial "make work" in Building "J" and the Central Stores Warehouse, *id.* According to plaintiff, "[i]nternal management documents establish that the purpose of these measures was to punish Mrs. English for what management termed her 'subversive' activity and to prevent Mrs. English from continuing to obtain evidence to prove that management was failing adequately to police com-

<sup>1</sup> On a somewhat contradictory note plaintiff alleges that "[p]rior to March 15, 1984, Mrs. English's complaints to management had been ignored by management and management had disparaged and derided her as paranoid." Complaint ¶ 9.

pliance with NRC safety and quality regulations." *Id.* ¶ 22. In addition to the punishment imposed upon charge No. 3, English was watched constantly by a member of management from a desk overlooking hers in Building J. isolated from her fellow workers, "and not even permitted to each lunch in the company lunch room with them. *Id.* ¶ 24.

On April 30, 1984, GE's management informed English that she would have to "bid" for a position in the NFMD, other than in the Chemet Lab or other controlled area, and if no position was available within ninety days she would be placed on a 'lack of available work' status." Eighty-nine days later, on July 29, 1984, plaintiff was sent home to change into safety shoes "although plant rules did not require that anyone in the area in which she was working wear safety shoes." *Id.* ¶ 26. The next day, July 30, 1974, having obtained no other position, GE fired English. Since her discharge plaintiff has been unable to find acceptable employment and has been impoverished. *Id.* ¶ 35.

Plaintiff alleges GE's actions were intended to teach her a lesson and make an example out of her because she raised safety concerns, "the resolution of which caused, was causing and would continue to cause delay in production at the GE plant, embarrass GE with its principal regulator, the NRC, and encourage other employees to observe, prove and report GE's sloppy and potentially dangerous safety procedures." *Id.* ¶ 29. According to English, GE's treatment of her was "clearly discriminatory" because no investigation was undertaken with respect to any workers on shifts between March 10 and 12 (when plaintiff had marked off contaminated areas) and because similar failures to clean up contamination by other employees had "never resulted in the kind and severity of disciplinary treatment meted out by GE to Mrs. English." *Id.* ¶ 27.

In Count 1 of the complaint plaintiff alleges her discharge by GE was wrongful and "in violation of the strong public policies embodied in the laws of the United States, which encourage and require safe operation of nuclear facilities and require workers to report potential violations of NRC regulations." *Id.* ¶¶ 41-42. In Count 2 plaintiff alleges her discharge constituted a "gross, wanton and reckless violation of public policy and disregard of her rights, and was done with actual malice entitling her to punitive damages against GE." *Id.* ¶¶ 43-44. Plaintiff also alleges that as a result of defendant's intentional, malicious, extreme and outrageous conduct, she now suffers a severely depressed and emotional condition which has required professional psychiatric treatment. *Id.* ¶¶ 36-38. Hence, plaintiff seeks compensatory damages in Count 3 and punitive damages in Count 4 for intentional infliction of emotional distress. *Id.* ¶¶ 45-51.

Defendant GE has moved to dismiss plaintiff's entire complaint pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure. Defendant argues that plaintiff's claims, are preempted by federal law in that they concern matters of nuclear safety and are specifically preempted by Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851, commonly referred to as "the whistle blower provision." Defendant further contends that even if plaintiff's claims are not preempted, plaintiff has failed to state valid causes of action for wrongful discharge and intentional infliction of emotional distress under North Carolina law. Specifically, defendant argues that North Carolina does not recognize a general public policy exception to the employment at will doctrine and that defendant's conduct concerning plaintiff was not outrageous.

## II. PREEMPTION

### A. The Law

Federal preemption generally may occur in either of two ways. Where Congress evidences an intent, either expressly or inferentially, to occupy a given field, state laws falling within the field are preempted. *Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238, 284 (1984) (citations omitted). For instance, matters of nuclear safety regulation are committed exclusively to the federal government. *Pacific Gas & Electric Company v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 212 (1983). On the other hand, if the federal government does not "occupy the field," preemption turns on whether the state law conflicts with the federal law to the extent it is impossible to comply with both or whether the state law frustrates the purposes and objectives of Congress. *Silkwood*, 464 U.S. at 248 (citations omitted).

Section 210 of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851, provides a remedy for employees of nuclear facilities who believe they have been discharged or otherwise discriminated against for making safety complaints concerning the construction or operation of nuclear facilities. The statute specifically provides that no NRC licensee, "may discharge . . . or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment" because the employee has testified, given evidence, or brought suit or engaged in "any other action to carry out the purposes" of the Atomic Energy Act (AEA) and the ERA. 42 U.S.C. § 5851 (a).<sup>2</sup>

<sup>2</sup> A split of authority has developed in the circuit courts as to whether the provisions of Section 210 protect an employee from retaliation based on purely internal safety complaints or whether participation in "a proceeding" is required. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984), and *Consolidated Edison Company of New York, Inc. v. Donovan*, 673

If an employee believes he has been discharged or otherwise discriminated against in violation of the Acts, he may file a complaint with the Secretary of Labor, within thirty days after the violation occurs. *Id.* (b) (2) (A). Within thirty days of the receipt of the complaint the Secretary must conduct an investigation and notify the individuals involved of the results. *Id.* Within ninety days of the receipt of the complaint the Secretary must either deny it or order the offending employer to "(i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant." *Id.* (b) (2) (B). The statute also provides for the payment of all costs and expenses, including attorneys' and expert witness fees, reasonably incurred by the complainant in bringing the complaint upon which an order is issued. *Id.* Section 210 expressly provides for judicial review of the Secretary's order by a United States Court of Appeals. *Id.* (c).

The protection offered by Section 210 is limited. It does not extend to any employee "who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of . . ." the AEA. *Id.* (g).

Finally, an order issued pursuant to Section 210 is subject to civil enforcement. The action to require com-

F.2d 61 (2d Cir. 1982) (Section 210 protects internal safety complaints). *Contra Brown & Root v. Donovan*, 747 F.2d 1029 (5th Cir. 1984) (Section 210 is designed to protect only "whistle blowers" who provide information to governmental entities). In this action plaintiff alleges both internal and external complaints (Complaint ¶¶ 10, 12, 17) and would appear to fall within the section.

pliance may be brought in the appropriate United States district court by either the individual on whose behalf the order was entered to the Secretary. *Id.* (d)-(e). If in an action brought by the individual the district court enters a final order directing compliance, the court may award the individual the costs of litigation. *Id.* (e). If the Secretary obtains judicial enforcement of his own order, "the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages." *Id.* (d).

Few courts have considered the question of whether or not Section 210 preempts state causes of action arising from the retaliatory termination of or discrimination against an employee for having voiced nuclear safety concerns. *Snow v. Bechtel Construction Inc.*, 647 F. Supp. 1514 (C.D. Cal. 1986); *Stokes v. Bechtel North American Power Corporation*, 614 F. Supp. 732 (N.D. Cal. 1985); *Wheeler v. Caterpillar Tractor Company*, 108 Ill. 2d 502, 485 N.E. 2d 372 (1985), *cert denied*, 475 U.S. 1122 (1986). In support of their holdings each of these courts either relies on or distinguishes the Supreme Court's decision in *Silkwood v. Kerr-McGee Corporation*, *supra*.

In *Silkwood* the plaintiff, father of the decedent, Karen Silkwood, sought relief under state tort law for radiation injuries suffered by his daughter at a nuclear power plant run by the defendant, Kerr-McGee. The Tenth Circuit Court of Appeals struck the jury's award for punitive damages on the grounds of federal preemption. *Silkwood v. Kerr-McGee Corporation*, 677 F. 2d 908, (10th Cir. 1981). The Supreme Court reversed, holding that the award of punitive damages based on Oklahoma law was not preempted by the Atomic Energy Act. *Silkwood*, 464 U.S. at 258.

In allowing punitive damages on a state claim for radiation injuries the *Silkwood* court homed in on two items: (1) express language by Congress recognizing state tort recoveries and (2) the absence of a federal remedy. The Price-Anderson Act, 42 U.S.C. § 210, an amendment to the AEA, established an indemnification scheme whereby operators of nuclear facilities would have limited liability in the event of any one nuclear accident. *Id.* at 251. "[T]he discussion preceding its enactment and subsequent amendment indicates that Congress assumed that persons injured by nuclear accidents were free to utilize existing state tort law remedies." *Id.* at 251-52 (footnote omitted). Further, the court noted the absence of a federal remedy and expressed its disbelief "that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Id.* at 251 (citation omitted). Clearly, the focus in *Silkwood* was on radiation injuries caused by nuclear accidents and their redress.

Two district courts in California have addressed the precise issue of the preemptive effect of Section 210 on state law causes of action but they differed in result. *Snow v. Bechtel Construction, Inc.*, *supra*; *Stokes v. Bechtel North American Power Corporation*, *supra*. In each case the plaintiff had pursued a state law claim for wrongful discharge.

In *Stokes* the court was "unable to accept the thesis that the enactment of Section 210 requires the invalidation of all preexisting state law remedies for aggrieved employees involved in the field of nuclear power." *Stokes*, 614 F.Supp. at 745. The court's inability stemmed from the *Silkwood* decision and the permissive language found in Section 210 and its legislative history (*i.e.*, *may* file a complaint, *may* apply to the Secretary for review, *could* help assure compliance, *could* seek redress). *Id.* at 744-45. In terms other than permissiveness, the *Stokes* court

failed to address any specific provisions of Section 210 and its history.

In a similar action the *Snow* court concluded that *Stokes* should not govern and respectfully declined to follow it. That court was not persuaded that permissive language was inconsistent with the exclusivity of a federal remedy. Instead, it relied on the legislative history of Section 210 and language in *Olguin v. Inspiration Consolidated Copper Company*, 740 F.2d 1468, 1475 (9th Cir. 1984), indicating that the "whistleblower provision" in the Mine Safety and Health Act was an exclusive remedy that preempted a state claim of wrongful discharge. *Snow*, 647 F.Supp. at 1518. Further, the *Snow* court found *Silkwood* "clearly distinguishable," concluding that the Supreme Court's analysis of radiation injuries was inapposite to a consideration of retaliatory termination. *Id.* at 1519. The court held that "[t]o the extent that *Snow* claims he was wrongfully terminated . . . because he complained about safety violations, his action is preempted by [42 U.S.C.] § 5851." *Id.*

In the only reported state court opinion on this topic the Supreme Court of Illinois held, *sua sponte*, that Section 210 did not preempt a valid cause of action for wrongful discharge. *Wheeler v. Caterpillar Tractor Company, supra*. The court found "the situation here analogous to *Silkwood* and conclude[d] that it was not the Congressional intent to preempt the field." *Id.* at —, 485 N.E.2d at 376. The dissent found the majority's reliance on *Silkwood* "misplaced" and would hold that "plaintiff's cause of action is preempted by section 210." *Id.* at —, 485 N.E.2d at 379 (Moran and Ryan, J.J., dissenting).

## B. Analysis

Defendant GE argues that federal law provides plaintiff with an exclusive remedy for claims of discharge or discrimination in retaliation for voicing concerns of nu-

clear safety. Specifically, defendant argues that plaintiff's complaint concerns matters of nuclear safety—matters that are exclusively regulated by the federal government—and therefore is expressly preempted. Defendant further argues that Section 210 of the ERA provides a detailed procedure for redressing discharge and discrimination claims and that it is so pervasive that exclusivity of federal remedy is inferred. Not surprisingly, plaintiff contends that this action centers on the regulation of the employer-employee relationship and that matters of nuclear safety, if implicated at all, are only peripheral to her claims. Plaintiff further contends that her claims do not conflict with Section 210 such that compliance with both is impossible and that her claims necessarily further the objective of Congress, i.e., providing nuclear employees an unfettered opportunity to speak out on matters of safety.

## 1. The Complaint

With respect to defendant's first argument—that plaintiff's complaint concerns matters of nuclear safety—to some extent defendant is correct. Plaintiff expressly states that her termination "constitutes a wrongful discharge in violation of the strong public policies embodied in the laws of the United States, which encourage and require workers to report potential violations of NRC regulations." Complaint ¶ 42. However, while nuclear safety is of concern in this action it is only tangential to the action itself, that being plaintiff's claims for wrongful discharge and intentional infliction of emotional distress. Hence, the court does not believe plaintiff's action is preempted under *Pacific Gas & Electric, supra*, on the basis that the complaint concerns matters of nuclear safety regulation. Consequently, we turn our attention to defendant's second argument and Section 210 of the ERA.

## 2. Section 210

The court believes Section 210 provides plaintiff with a remedy for both of her causes of action. Her claim for wrongful discharge clearly falls within the employer conduct defined and prohibited by Section 210. Somewhat trickier is the question of whether a claim for intentional infliction of emotional distress falls within the statute's prohibition of "other discrimination." However, with the possible exception of her being removed from the laboratory under guard, all of plaintiff's allegations go to her "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 5851(a). Furthermore, although unable to recover exemplary damages, plaintiff would be compensated for any emotional damages which she may have suffered. See *DeFord v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983). Hence, plaintiff's injuries as alleged in the complaint would be adequately redressed under Section 210.

In this action the question of preemption initially turns on whether Section 210 can be said to regulate nuclear safety. If it can, plaintiff's causes of action would be preempted pursuant to *Pacific Gas & Electric, supra*. The court is unconvinced, however, that Congress intended Section 210 to be a regulator of nuclear safety and therefore preemptive under *Pacific Gas & Electric, supra*.

This section, entitled "Employee protection," was designed as "an administrative procedure" to "offer[] protection to employees who believe they have been fired or discriminated against as a result of the fact that they have testified, given evidence, or brought suit . . ." under the AEA or the ERA. S. Rep. No. 848, 95th Cong., 2d Sess. 29, reprinted in 1978 U.S. Code Cong. & Ad. News 7303, 7304. Such protection was necessary since "[u]nder this section, employees and union officials could help assure that employers do not violate requirements of the Atomic Energy Act." *Id.* As the legislative history indicates, protecting an employee's livelihood in the nuclear

industry while at the same time encouraging disclosure of potential safety hazards and violations are matters inextricably intertwined. The question, therefore, is whether by Section 210 Congress put safety or employee protection first. The court believes employee protection was the paramount congressional intent. Thus, in this instance "preemption should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law." *Silkwood*, 464 U.S. at 256.

Preemption, therefore, hinges on the operation of Section 210 itself. As part of this operation three aspects of the statute deserve closer inspection: (1) its applicability only to an employee who has not violated any nuclear requirement, (2) the absence of a provision for exemplary damages on behalf of an aggrieved nuclear employee, and (3) the speed with which a charge brought under Section 210 must be resolved.

Subsection (g) of Section 210 expressly states that "Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act. . . ." 42 U.S.C. § 5851 (g). Defendant argues that failure to observe the limitation imposed by Congress in subsection (g) in a state action for wrongful discharge could result in the reinstatement and compensation of a potentially dangerous employee. Plaintiff contends the limitation would be taken into account because the employee would be fired not because he voiced safety concerns but because he contributed to or caused a violation of some nuclear requirement.

The limitation imposed by subsection (g) can best be illustrated with reference to these hypothetical cases: Employee A "blows the whistle" on his employer concerning a potential safety violation. A has not violated any nuclear safety requirements. Employee B blows the whistle on his employer concerning the violation of an AEA requirement which B himself contributed to or caused. Employee C similarly blows the whistle; however, while he neither contributed to nor caused the potential safety violation which he reported he has violated a separate and distinct requirement of the AEA. Each employee may successfully show a violation of subsection (a) of Section 210.

The violation will be abated as to employee A but not B and C. A clearly falls within the language of Section 210, not having caused any violation. B has committed a safety violation, the very one which caused him to blow the whistle. Even though B is successful with respect to subsection (a) he nonetheless is barred from obtaining relief by subsection (g). This bar most clearly resembles the equitable doctrine of "clean hands" whereby relief is denied to those guilty of improper conduct in the matter as to which they seek relief. *See generally* 30 C.J.S. *Equity* § 93 (1965). In employee C's case Congress has seen fit to go even further, denying relief because he committed a violation not even remotely related to that on which he blew the whistle.

The impact of subsection (g) is therefore quite clear: even if an employer has violated subsection (a)—i.e., discharged or discriminated against an employee because he voiced concerns of nuclear safety—the employee is absolutely barred from obtaining redress if he has caused a violation of *any* nuclear safety requirement. The court is aware of no provision requiring application of the absolute bar in state court actions for wrongful discharge or intentional infliction of emotional distress arising from an employee's complaints concerning nuclear

safety. By law the state court would not be required to determine whether or not the aggrieved employee violated some requirement of the Atomic Energy Act or its amendments. Instead, the state court could end its inquiry at whether or not the employee was wrongfully discharged or discriminated against for being a whistleblower. As a result of the state action, someone like employee B or C who has violated one or more nuclear requirements would be reinstated and compensated. Subsection (g) totally eliminates such a possibility. Hence, the court believes subsection (g) of Section 210 is strong evidence of Congress' intent to preempt state actions for wrongful discharge and other discrimination with respect to nuclear whistleblowers.

Further evidence of Congress' preemptive intent lies in the absence of any provision for exemplary damages to be awarded to an employee in the event of a violation of subsection (a). The only possibility of exemplary damages would arise when the Secretary of Labor seeks civil enforcement of his order requiring the offender to abate the violation of subsection (a) and to reinstate and compensate the individual. 42 U.S.C. § 5851(d). In other similar legislation, such as the Toxic Substances Control Act and the Safe Drinking Water Act, Congress expressly provided for an award of exemplary damages "where appropriate." 15 U.S.C. § 2622(b)(2)(B); 42 U.S.C. § 300j-9(i)(2)(B)(ii). *See also* Solid Waste Disposal Act, 42 U.S.C. § 6971(b) (where Secretary of Labor finds employee has been wrongfully discharged or discriminated against he shall issue a decision "requiring the party committing such violation to take such affirmative action to abate the violation as . . . [he] deems appropriate, including, *but not limited to*, the rehiring or reinstatement of the employee or representative of employees to his former position with compensation") (emphasis added). In the statutes upon which Section 210 is modeled, *see* S.Rep., *supra*, there are no provisions for an award of exemplary damages to an aggrieved

employee. Water Pollution Control Act, 33 U.S.C. § 1367 (b); Clean Air Act, 42 U.S.C. § 7622(b)(2)(A). Obviously, Congress has reached an informed judgment that in no circumstances should a nuclear whistler blower receive punitive damages when fired or discriminated against because of his or her safety complaints. This judgment is particularly highlighted by the instant action wherein plaintiff seeks \$2.3 billion in punitive damages.

Finally, the court is impressed with the speed with which charges brought pursuant to Section 210 must be resolved. Employees who believe a violation of Section 210(a) has occurred must file a complaint with the Secretary of Labor within thirty days after such violation occurs. From the filing of the complaint the Secretary has ninety days either to dismiss the complaint or order relief. The reason for such quick action appears to be twofold. First, if a violation has occurred the employee is restored to his position without a substantial interruption in lifestyle or livelihood. Further, he remains active in his field of expertise within the nuclear industry. Second, by requiring a speedy complaint the regulatory authorities may discover potential hazards and violations that might otherwise have gone undiscovered for an uncertain period of time. For instance, consider a nuclear facility that is able to cover up some hazard or violation for which an employee voiced internal concerns yet was fired or discriminated against. The aggrieved employee waits till the last day under the applicable state statute of limitations to file suit, normally about three years. A catastrophe could already have occurred while the employee contemplated filing an action in state court. The court does not believe this is what Congress intended and would permit to occur.

The court's review of Section 210 and its history leads it to conclude that the statute is "a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to

supplement it'. . . ." *Pacific Gas & Electric*, 461 U.S. at 204. Indeed, "[a] more comprehensive statute could hardly be imagined." *Wheeler*, 108 Ill.2d at —, 485 N.E.2d at 379 (Moran and Ryan, J.J., dissenting). The court reaches its conclusions mindful of the cases discussed above. In contrast to *Silkwood*, this court is not aware of any congressional language recognizing state tort remedies for wrongful discharge and other discrimination. Furthermore, Congress has provided a federal remedy for such claims in Section 210. For these reasons this court concludes that the reliance on *Silkwood* by the courts in *Stokes* and *Wheeler* was misplaced. The latter case was decided without even the benefit of briefing or argument. The court simply is unpersuaded by these decisions.<sup>3</sup>

Based on the foregoing, the court finds that plaintiff's cause of action for wrongful discharge under state law is preempted by Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851. Consequently, defendant's motion to dismiss Counts 1 and 2 of the complaint pursuant to Rule 12(b)(1), F.R.Civ.P., is granted on the ground that this court lacks jurisdiction over the subject matter. Although it appears that plaintiff's claim for intentional infliction of emotional distress also is preempted by Section 210 there remains a question as to whether the claim, if valid, may nevertheless proceed in light of the Supreme Court's holding in *Farmer v. United*

<sup>3</sup> The plaintiff has proffered an administrative decision of the Secretary of Labor which analyzes whether the voluntary dismissal of a complaint brought pursuant to Section 210 should be dismissed with or without prejudice. *Nolder v. Raymond Kaiser Engineers, Inc.*, No. 84-ERA-5 (D.O.L., June 28, 1985). The Secretary concludes that such a dismissal is without prejudice and reasons that otherwise the dismissal would preclude a plaintiff's similar claims in state court. Plaintiff argues by analogy that the Secretary would not have addressed the issue of res judicata if Section 210 were preemptive of state claims. Perhaps, but the issue of preemption was not squarely before the Secretary and for this reason the court finds *Nolder* unpersuasive.

*Brotherhood of Carpenters & Joiners of America*, 430 U.S. 290 (1977). This question will be addressed in section III, *infra*.

Even if the court did not hold that plaintiff's claim for wrongful discharge is preempted by Section 210 of the Energy Reorganization Act, the court would be constrained nevertheless to hold that plaintiff has failed to state a cause of action for wrongful discharge in light of the Fourth Circuit Court of Appeals' decision in *Guy v. Travenol Laboratories, Inc.*, 812 F.2d 911 (4th Cir. 1987). The plaintiff in *Guy* alleged that he was fired from his supervisory position at the defendant's North Carolina drug manufacturing plant after refusing to falsify certain records pertaining to the quality and quantity of pharmaceuticals that drug manufacturers are required to keep under the Food and Drug Administration's regulations, falsification of which would have subjected him to criminal sanctions. After analyzing the law concerning employment at will in North Carolina the Court of Appeals concluded that "[an] employer may terminate any employee for any reason unless the employee has a specific duration contract, gave some additional consideration for permanent employment, or lost his job for refusing to give perjured testimony." *Guy*, 812 F.2d at 915. The court held that plaintiff Guy's complaint did not come within any of the stated exceptions and therefore failed to state a cause of action under North Carolina law.

In this instance plaintiff alleges her discharge from GE was wrongful in that it violated "the strong public policies embodied in the laws of the United States, which encourage and require safe operation of nuclear facilities and require workers to report potential violations of NRC regulations." Complaint ¶ 42. Plaintiff, however, has not alleged either the existence of a specific duration contract, the giving of some additional consideration, or a discharge for refusing to give perjured testimony. Despite

plaintiff's persistent arguments to the contrary, this court may not disregard the pronouncements of the Fourth Circuit when they are not distinguishable. *Doe v. Charleston Area Medical Center, Inc.*, 529 F.2d 638, 642 (4th Cir. 1975); *Spell v. McDaniel*, 591 F.Supp. 1090, 1098 (E.D.N.C. 1984).

Furthermore, the court is not convinced that plaintiff was under any legal duty to report potential safety violations. Plaintiff relies on 10 C.F.R. Parts 19 and 21 and 42 U.S.C. § 2273 for the proposition that plaintiff could have been subjected to severe criminal sanctions for failure to report potential safety violations. The court has thoroughly reviewed the regulations and statute asserted by plaintiff as imposing a legal duty and is unable to conclude that any such duty is or was imposed. See *Radiation Technology, Inc.*, 8 N.R.C. 655, 658, 668-69 (1978); 42 Fed.Reg. 28891, 28892 (1977); 38 Fed.Reg. 22217 (1973).

Based on the foregoing the court finds that plaintiff has also failed to state a cause of action for wrongful discharge in violation of the laws of North Carolina. Consequently, the court will grant defendant's motion pursuant to Rule 12(b)(6) to dismiss plaintiff's claim for wrongful discharge on the alternative ground that plaintiff has failed to state a claim upon which relief can be granted.

### III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Despite having concluded that plaintiff's cause of action for intentional infliction of emotional distress should be preempted, there remains the possibility that the claim, if valid, may proceed in light of *Farmer v. United Brotherhood of Carpenters & Joiners*, *supra*, which will be summarized later. First, we examine the validity of the cause of action as alleged.

In a recent decision the North Carolina Court of Appeals addressed a claim for intentional infliction of emotional distress in an employment context on a motion to dismiss. *Dixon v. Stuart*, 85 N.C.App. 338, 354 S.E.2d 757 (1987). In *Dixon* the plaintiff sued the City of Winston-Salem, North Carolina and several of its agents and employees, seeking compensatory and punitive damages for loss of employment opportunities, injured professional standing, emotional and physical illness resulting in permanent injury, and suffering of humiliation and embarrassment. The plaintiff alleged (1) that the individual defendants unlawfully conspired to hinder, obstruct and injure his career advancement with the City of Winston-Salem and to induce the City not to promote plaintiff by, inter alia, ridiculing and harassing the plaintiff in the workplace and (2) that the defendant's acts (a) were willful and malicious; (b) caused the plaintiff humiliation and embarrassment in the workplace; (c) were extreme and outrageous; (d) caused plaintiff to suffer humiliation, embarrassment, loss of professional status, physical illness and severe and extreme mental distress. *Dixon*, 85 N.C.App. at 338-39, 354 S.E.2d at 758. The trial court granted the defendant's motion to dismiss the action pursuant to Rule 12(b)(6) of the North Carolina Rules of Procedure on the ground that the complaint failed to state a claim upon which relief could be granted.

The Court of Appeals reversed the lower court's decision. In that decision Chief Judge Hedrick focused on plaintiff's allegations regarding ridicule and harassment in the workplace and that the defendant's acts intended to cause and actually did cause plaintiff to suffer extreme emotional distress. The court held:

We cannot say that it appears beyond doubt that plaintiff can prove no set of facts in support of these allegations which would entitle him to relief from these defendants for intentional infliction of emotional distress. Extreme and outrageous ridiculing

and harassing has been grounds for recovery under this tort before. See, e.g., *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 140 (1986); *Woodruff v. Miller*, 64 N.C.App. 364, 307 S.E.2d 176 (1983).

*Id.* at 341, 354 S.E.2d at 759.

Pursuant to *Dixon* this court believes plaintiff has stated a valid cause of action for intentional infliction of emotional distress. Plaintiff alleges that the acts on the part of GE's management were intended and did in fact cause plaintiff to suffer severe emotional distress. With respect to "extreme and outrageous" conduct plaintiff alleges that GE's management (1) removed her from her job in the Chemet Lab under guard as if she were a criminal, exposing her to contempt and ridicule; (2) assigned her to a degrading "make work" job; (3) derided her as paranoid; (4) barred her from employment in controlled areas; (5) subjected her to constant surveillance in the workplace; (6) isolated her from fellow workers and did not even permit her to eat in the company lunchroom with her fellow workers; and (7) conspired to fraudulently charge her with violations of safety and criminal statutes. Although defendant GE vehemently contends and argues that plaintiff has failed to state a claim, it neglected in its reply brief to address and attempt to distinguish, if possible, the *Dixon* decision. The court, however, believes that under *Dixon* plaintiff has stated a valid claim for intentional infliction of emotional distress. Therefore, defendant's motion to dismiss Counts 3 and 4 of the complaint pursuant to Rule 12(b)(6), F.R.Civ.P., cannot be granted.

Although plaintiff has stated a valid cause of action for intentional infliction of emotional distress there remains, however, the issue of whether the claim may proceed despite the apparent preemptive effect of Section 210, 42

U.S.C. § 5851, in light of the Supreme Court's decision in *Farmer v. United Brotherhood of Carpenters & Joiners, supra*. In *Farmer* the plaintiff, a union member, had brought a state court action against the union alleging that the union had discriminated against him in hiring hall referrals and had intentionally inflicted emotional distress on him through a campaign of public ridicule and incessant verbal abuse. All of the plaintiff's claims were held preempted by the National Labor Relations Act (NLRA) except a potential emotional distress claim. The basis of the Court's holding was that there was no federal protection offered by the NLRA against a union's outrageous conduct. *Farmer*, 430 U.S. at 302. Instead the focus of a National Labor Relations Board proceeding would solely concern whether the defendant union discriminated against the plaintiff and whether a cease and desist order and back pay were proper. It has been held that *Farmer* created a "narrow exception to federal preemption." *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367, 1369 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978).

In this action, plaintiff has a federal remedy in Section 210. That section specifically addresses "other discrimination" and provides for compensatory damages in the case of a violation. With the possible exception of being removed from the Chemet Lab under guard, all of plaintiff's allegations concern "terms, conditions, or privileges of employment." 42 U.S.C. § 5851(a). Being removed under guard would not in and of itself support a cause of action for intentional infliction of emotional distress. Hence, the court believes plaintiff's claims regarding emotional distress should be presented to the Secretary of Labor pursuant to Section 210. See *Olguin v. Inspiration Consolidated Copper Company*, 740 F.2d 1468, 1475-76 (9th Cir. 1984).

Based on the foregoing the court finds that plaintiff's cause of action for intentional infliction of emotional dis-

tress is preempted by 42 U.S.C. § 5851. Consequently, defendant's motion to dismiss Counts 3 and 4 of the instant complaint pursuant to Rule 12(b)(1), F.R.Civ.P., on the ground that this court lacks jurisdiction over the subject matter will be granted.

#### IV. SUMMARY

To summarize, defendant's motion to dismiss is granted as to counts 1 and 2 of the complaint pursuant to Rule 12(b)(1) on the ground that the court lacks jurisdiction over the subject matter and on the alternative ground pursuant to Rule 12(b)(6), F.R.Civ.P., that plaintiff has not stated a claim upon which relief can be granted. While defendant's motion pursuant to Rule 12(b)(6) to dismiss Counts 3 and 4 of the complaint, alleging a claim for intentional infliction of emotional distress and punitive damages is not well taken, these counts are dismissed pursuant to Rule 12(b)(1) on the ground that the court lacks subject matter jurisdiction. The action is therefore dismissed in its entirety, and the clerk of court is directed to enter judgment accordingly.

SO ORDERED.

/s/ F. T. Dupree Jr.  
F. T. DUPREE, JR.  
United States District Judge

February 10, 1988.

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Case No. 85-ERA-00002

IN THE MATTER OF VERA M. ENGLISH

v.

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Before: ROBERT J. BRISENDEN  
Administrative Law Judge

## DECISION AND ORDER

This is a proceeding under the Energy and Reorganization Act of 1974, as amended, (hereinafter referred to as the "Act"), 42 U.S.C. § 5851, and its implementing regulations, 29 C.F.R. Part 24.

The Complainant Vera English filed a complaint with the United States Department of Labor, under 29 C.F.R. § 24.3, on August 24, 1984, and an amended complaint on August 27, 1984. Her Complaint alleged discrimination as a result of the initiation of and the participation in Nuclear Regulatory Commission (hereinafter NRC) investigations of facilities at the Respondent General Electric Company (hereinafter GE) plant located in Wilmington, North Carolina. On October 2, 1984, following an investigation, the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor, concluded that English had been discriminated against as defined and prohibited by the Act and 29 C.F.R. § 24.4. The decision of the said Administrator was appealed by both Complainant and the Respondent.

A formal hearing was held in Wilmington, North Carolina, from December 17 to December 19, 1984, and a second session of the hearing was held on March 19 to March 28, 1985, at which times the parties were afforded full opportunity to present evidence and argument. The findings and conclusions in this decision are based upon my observation of the witnesses who testified at both sessions of the hearing, upon an analysis of the entire record, arguments of the parties (both oral and written), applicable regulations, statutes, and case law precedent. By agreement of the parties, time constraints applicable to this case were waived.<sup>1</sup> On April 5, 1985, an Order

<sup>1</sup> Shortly after the first session of the hearing, the parties had waived the time constraints of 29 C.F.R. § 24.6, because of the necessity of having the hearings continued into a second session. Additionally, in order to allow time for the submission of post-

was issued setting the court's time limits on the submission of briefs and proposed findings of fact, Fee and Cost Petition, and the response by GE to said petition. The Order also clearly indicated that the record, for the submission of evidentiary documents or any other documents, was closed. On June 27, 1985, because said order had been ignored, as was evidenced by numerous documents mailed in to the judge's San Francisco office, another Order was issued advising the parties that any documents submitted which were in contravention of the April 5, 1985, Order would not be considered. Accordingly, Respondent's Motion to Strike a Portion of Complainant's Brief is granted and no documents or material submitted post-hearing is considered part of the evidentiary record.

#### *Statement of the Case*

Vera English was an employee of GE from November 13, 1972 to July 30, 1984. During the times relevant to this case, Mrs. English worked in the Chemet Laboratory.<sup>2</sup>

On March 5, 1984, Mrs. English was an hourly worker in said laboratory. At that time, she was working on the shift known as the "B" shift. In that particular week, she started working Sunday from 7:00 a.m. to 3:10 p.m. She worked the same hours on the fifth, sixth and seventh and eighth of March. She then switched to a different shift, on Friday. This was her normal routine during that month. Her shift Friday evening, started at 11:00 p.m. and went on to 7:30 a.m., a shift commonly

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hearing briefs, the parties have agreed to waive the requirements of 29 C.F.R. § 24.6(a) and 24.6(b).

<sup>2</sup> Many of the allegations and contentions of both parties were too far removed in time to have any significant relevance to this case. Accordingly, although Mrs. English worked in the Chemet Lab for twelve years, other than for taking cognizance of Complainant being an experienced laboratory worker, under the provisions of 29 C.F.R. § 24.5(e)(1), the time frame was limited by this judge to 1982 to 1984.

referred to as a "graveyard" shift. She had no immediate supervisor to bring complaints to until the following Sunday evening, when a William Lacewell came on duty. It was in the week prior to that Sunday, starting with Monday, March 5, 1984, that events occurred which had great bearing on her removal by management from the Chemet Lab and the eventual termination of her employment with GE.

The Chemet Lab included what were known as "controlled areas".<sup>3</sup> Mrs. English had made complaints to the NRC and to GE management in years prior to the March 1984 period of time, but the parties were limited to the time frame above-mentioned (see footnote 2, *supra.*). Mrs. English had contacted the NRC on August 29, 1982 and on February 13, 1984. Investigations into her allegations were conducted by the NRC on September 7-10, 1982, and March 26-29, 1984. The same February 13th

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<sup>3</sup> The Chemet Lab is a part of a large building within the GE facility in Wilmington, North Carolina. There are various laboratories within the Chemet Lab.

The plant is involved in the production of fuel bundles of uranium material, and said "bundles" are intended for use at reactor sites for the production of electric power. Additionally, uranium powder is produced, primarily for sale to overseas customers. The Chemet Lab had areas calling for certain precautions, i.e., controlled areas. Persons leaving a controlled area must use a monitor or frisker, which is a hand held unit used to check for radiation contamination on any part of the body, including hands, feet, face and clothing. Another precaution taken, within the lab, are hoods with fans to pull off airborne contamination away from an individual who is working under that hood. Within the controlled or "semi-controlled" areas the lab workers must wear gloves, a lab coat and safety glasses. These workers work both with powder and liquid solutions of uranium. There are marble tables with marble legs for use by the lab workers. The marble material is not affected by vibrations and is easier to clean than other material. Safety rules require that any spillage of uranium powder or uranium liquid be brushed or cleaned off from time to time during the work hours, and especially before leaving the work shift.

allegations were brought to the attention of GE management in a written report by Complainant, dated February 21, 1984. An examination and investigation of conditions, upon which Mrs. English's complaints were based, was conducted by GE on March 8-21 and March 26-30, 1984. GE's Quality Assurance Review report, dated April 26, 1984, revealed that several of Mrs. English's accusations of violations of company practice and procedure had substance. A prior GE Chemet Lab Safety Review report (dated March 29, 1984), concluded that safety procedures and conditions in the lab were adequate. With reference to the same allegations, NRC concluded that they were unsubstantiated.

Claimant's work in the Chemet Lab consisted of quality control duties, in which samples of uranium powder are weighed, oxidized, weighed again, dissolved in nitric acid and finally weighed again. The analyst is then able to determine the concentration of uranium in a given sample to ascertain whether the proper "mix" has been accomplished. On Monday, March 5, 1984, Mrs. English was in the process of weighing a sample when she found contamination left by the prior shift. This occurred again in the following three days. Mrs. English testified that the nature and amount of contamination required her to do considerable work to clean it up before she could start on her own work. She believed that the male workers, who worked the shift just prior to hers, were careless and sloppy in their work. She felt that they depended on her to clean up. According to Mrs. English, the contamination was quite visible to anyone. It was on her work surface and on a nearby microwave oven, a piece of equipment used by her and the workers on the prior shift. Additionally, she found uranyl liquid contamination (producing a yellow stain) on two legs of her work table. She cleaned all of this up for several days, then on Thursday or Friday, she again found new stains and contamination elsewhere. On this occasion, knowing that there was no supervisor present until Sunday, she

stated that she put red tape around the stain on the table legs so that she would be able to point it out to her supervisor, Bill Lacewell. Her purpose was also to indicate the areas of contamination as a warning to fellow workers. She testified that she purposely left the contamination, outlined by red tape, so as to prove to management that her co-workers were extremely lax in their performance of clean-up duties. Some of her prior complaints, in her view, had received little attention since she was thought to have insufficient proof of malfeasance by other employees. She felt that this was because she always promptly cleaned up visible contamination, therefore she had nothing tangible to show management to back her accusations.

She recalled that the red tape and the contamination was still there on Saturday and Sunday. Sunday evening, the first night after Thursday, that a regular supervisor was on duty, the Complainant promptly discussed the matter with supervisor Lacewell. Mrs. English was firm in her contention that she had not deliberately contaminated any part of her work station, and that she had cleaned the contamination left by others. With the exception of the portion of contamination outlined by red tape, all had been cleaned. She admitted she intentionally left said contamination for the purposes heretofore mentioned. She stated that she, at that time, trusted Mr. Lacewell more than other management personnel. She had on numerous occasions brought up the problems of the defective microwave oven, the workers not using the "friskers" on leaving controlled areas, and the constant failure to clean up contamination at her work station, but management, according to her, did not show serious concern on these subjects. Mrs. English was of the opinion that management's main concern was keeping up production so that safety was sacrificed, and accordingly her superiors did not appreciate her pointing out unsafe practices of fellow workers. She strongly

felt that such practices endangered her health and the health of others.

In her reporting on her concerns that Sunday evening, she pointed out the contaminated table legs outlined by red tape.<sup>4</sup> She advised Lacewell, at that time, that she did not intend to keep cleaning up for other people. She also related her concerns on what had occurred in the prior week, including the microwave defect that allowed leaks and fumes strong enough to give her a headache. She asked permission of Lacewell to use the "frisker" (personal survive device) to check out certain areas of her work station. Lacewell granted this request.

To some extent, Lacewell, in his testimony corroborated Complainant's story with reference to the microwave oven, her mention of the red tape and expression of her concern over other employees' spillage. However, he denied that she pointed out the contamination surrounded by red tape, or seeing the red tape.

Subsequent to the above events there was a correction of the microwave defect, and an inspection and cleaning of the area by GE personnel. All of which necessitated work stoppage in the affected areas of the laboratory. Additionally, as a consequence of Mrs. English's March 1984 complaints (made to NRC and GE), a series of communications, both written and oral, between management and Mrs. English began. Various meetings were held, some with Mrs. English present and some without her presence. Certain charges were set out in a letter dated March 15, 1984, which included:

1. the unauthorized removal of the personal survey instrument from the entrance to the laboratory;

<sup>4</sup> There was a dispute by management as to the use of red tape to designate a "hot" area. Some of the documents that Claimant relied on were ambiguous and confusing with reference to the use of red tape. Management claimed that red tape was to designate areas of storage of uranium products rather than to designate areas where spills had occurred.

2. the deliberate contamination of a table;
3. failure to clean up contamination, knowing it existed;
4. the continued distraction of other laboratory employees; and
5. disruption of normal laboratory activities.

Mrs. English appealed said charges, and during the company appeal process, it was finally determined that the "frisker" removal had been authorized. As to charges No. 2 and No. 3, GE's witnesses did not seem in total agreement as to whether said charges had merit or not. All but No. 3 were dropped or at least it was decided that no action would be taken in regard to same. Action was taken on the No. 3 infraction.

The punishment dealt to Mrs. English for "failure to clean up contamination, knowing it existed" was removal from the Chemet Lab and assignment to some rather menial work in the Building "J" Central Stores warehouse. Complainant testified that a man was assigned to watch her constantly and that she was humiliated in an incident concerning her shoes. At some time subsequent, Complainant was advised that she would have to "bid" for an open position, that she qualified for within the GE plant, provided that it was not one within the Chemet Lab. A time limit was set and, there apparently existing no such positions, she was involuntarily placed on a "lack of suitable work" status. There is nothing in the record to show that any "suitable" work position was ever offered to Complainant. Further, the record is devoid of any rebuttal evidence to Mrs. English's charge that she was the only person ever removed from the Chemet Lab for failure to clean up contamination. She was credible in her testimony that other workers had caused the contamination and there was no evidence to the contrary. Further, the evidence clearly shows, without contradiction, that at least one shift and possibly

two (not counting her shift) failed to clean up visible contamination. The area of contamination was outlined with red tape, whether such method was considered proper for dealing with the situation or not, the red tape added to the visibility of the contamination. Yet, no one using the same work table, in other shifts, bothered to report this nor to clean it up.

Testimony by GE management made it quite obvious that the sheer number of the complaints made by Mrs. English to NRC (and to management) brought about a cessation of work due to the GE's investigation and meetings and the concomitant NRC investigations. The latter investigations resulted in a rather mixed series of findings.<sup>5</sup>

The annoyance caused by Mrs. English's allegations, whether justified in management's eyes or not, coupled by the embarrassment and involvement of much of GE's management personnel with the NRC investigations, ap-

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<sup>5</sup> The severity level of violations for an NRC licensee, such as the GE Company, are graded from one to five. The larger the number, the less severe the violation. Severity levels I and II involve very significant violations; level III violations are significant; level IV violations are significant if left uncorrected; and level V violations are of minor concern.

Following the above discussed allegations, which were reported to and investigated by both GE and the NRC, Mrs. English filed additional allegations with the NRC in May and June of 1984. The latter complaints were not reported to GE, though GE learned of them through NRC investigations. A number of the May and June allegations were merely reiterations of the previously filed complaints. Of the 35 allegations investigated, five were found to be Severity level IV violations; one (failure of personnel to use personal survey devices) was determined to be a corrected prior violation; seven were partially or wholly substantiated, but were not deemed violations of NRC regulations or license requirements; one was unresolved; and two were not addressed. Three level IV violations and one level V violation were found to exist on the basis of independent NRC determinations. (See ALJ Exhibits 5-12, incl.; Employer's Exh. 11)

pears to have culminated around the March to May 1984 period, although NRC investigations continued during September, November and December of 1984 and January and March of 1985.

Mrs. English testified as to some rather bizarre series of break-ins into her home, corroborated in part by police testimony. Insufficient proof was presented to tie in GE employees.

Complainant called a psychologist, Dr. Peter Boyle, who testified that he was of the opinion that the actions of management, as related by Mrs. English to him, brought about a depressed and fearful emotional state. He reached this opinion after lengthy interviews and the administration of tests that included standard intelligence tests, multiphasic personality inventory and the Rohrschak ink blot test. He also reviewed her medical records and discussed with her the impact of the various actions taken against her by GE, during her final years of employment. He determined that Mrs. English was candid in her reports of her symptomology, and that she was neither paranoid nor suicidal. His diagnosis of her condition was that she was suffering from a severe adjustment reaction coupled with mixed emotional features, namely depression and "anger" (clinically termed "agitated depression"), all associated with stress resulting from her work situation. Specifically, her emotional problems are a cumulative effect of various stressful occurrences that Mrs. English experienced during her employment with Respondent. Dr. Boyle's prognosis was that the condition is treatable with supportive psychotherapy, including medication. He opined that Complainant should continue treatment once a week for at least six months. A Dr. Bill Knox, M.D., has been treating her on referral from Dr. Boyle.

Unfortunately, nothing was elicited on the cost of such treatment from Dr. Boyle.

### Discussion of Issues

The ultimate issue in this case, is whether the Respondent discriminated against Vera English due to her engaging in "protected activities". Such activities, in the instant case, being the initiating of and cooperating with the investigations of NRC.

In order for a Complainant to prevail on a discrimination claim under the Energy Reorganization Act, 42 U.S.C. § 5851 (hereinafter ERA), the Complainant must prove that: (1) the party charged with discrimination is an employer subject to the Act; (2) that the complaining employee was discharged or otherwise discriminated against with respect to his compensation, terms, conditions or privileges of employment; and (3) that the alleged discrimination arose because the employee participated in an NRC proceeding. *DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983). Once the employee shows that an illegal motive played some role in the discriminatory act(s), the burden shifts to the employer to prove that he would have discharged or taken whatever discriminatory action was proven, even if the protected activity did not occur. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984). She also *NLRB v. Transportation Management Corp.*, 103 S.Ct. 2469 (1983).

It was conceded that GE was an employer subject to the ERA. The banishment from the Chemet Lab and the subsequent discharge (for that is what it amounted to, regardless of the euphemism used by Respondent), clearly affected Mrs. English's terms, conditions and privileges of employment; and on her discharge date, the effect was total on her compensation.

The disciplinary actions of Mrs. English's employer coincided, in time, with her strongest worded complaints in March of 1985, and the meetings and communications, prior to the banishment from the laboratory, concerned

the subject of her actions in attempting to correct what she considered violations of NRC requirements.

There is little doubt that this lady was a difficult employee to handle, that she disrupted work activity at times, and that some of the time her complaints had only minor merit. Nevertheless, it also appears true that many of her complaints had a proper basis in fact, and that her concern for her own safety and the safety of fellow employee was a strong factor in her allegations.

The gist of Respondent's chief defense to the substantive charges was that Mrs. English was a high strung, nervous woman with marked and emotional reactions to practices that were not within her perfectionist's point of view. To bolster this defense theory, a somewhat selective chart of charges made to the NRC and the NRC findings was presented by Respondent. The contention was that the majority of complaints resulted in findings of "no merit" or, at most, a minimal violation. A review of the NRC Findings does not indicate such an innocuous conclusion with reference to GE's record with the NRC. This "scorecard", however, has little to do with the central issue. Unique or important information is not required. The need to protect channels of information from being dried up by Employer intimidation is the purpose of the Act, not the disclosure of particular types of information, *DeFord v. Secretary of Labor*, *supra*. Nevertheless, Respondent would have a valid defense if it had proven sufficient justification for the disciplinary actions taken, *apart from Complainant's participation in protected activity*.

On the last day of the hearing Mrs. English became overwrought and indulged in an outburst which lasted several minutes, the subject of which was the frustration that she felt over her employer's refusal to give credence over her concerns on hazardous practices. From the defense point of view such an emotional response to cross-examination tended to support the contention that Com-

plainant was an unusually excitable individual, therefore her disruption of the lab and its workers gave Employer reason to remove her. On the other hand, considering the unrefuted testimony of the psychologist, this behavior, at the end of a long trial, could reasonably be interpreted as symptomatic of the emotional state which had resulted from Employer's discriminatory actions.

Additionally, Respondent urges that the banishment from the Chemet Lab and the subsequent discharge was wholly justified by Mrs. English's serious infraction of the "failure to clean up visible contamination" rule. GE's management witnesses testified that they considered such actions as a means of entrapment of Radiation Safety Inspectors for the company. Management felt a concern as to the lengths that Complainant would go to in promoting her views on safety practices, and therefore considered her a threat to other employees' safety. While this may be logical, if management's view of her personality is accepted, this expressed concern with safety is belied by Respondent's inertia in regard repeated violations of safety rules by other employees. One example of this being the failure to investigate why the uranyl stain was not cleaned up by any other party prior to the Monday following Complainant's report to Lacewell.

Employer's burden requires that it prove an affirmative defense, i.e., it has the burden of persuasion. *Mt. Healthy v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471. In dual motive cases, the employer bears the risk that the legal and illegal motives cannot be separated. An effort must be made to sort out these motives. The presence or absence of retaliatory motive is a legal conclusion and is provable by circumstantial evidence. *Mackowiak, supra*. at 1162 and 1164.

In the instant case, Respondent's witnesses were not believable in attributing the discipline imposed on: (1) regards for other employees safety which was ostensibly endangered by Mrs. English's actions and complaints and

(2) for the "deliberate" violation of the clean-up rule. When the whole of the evidence is considered, there appears no adequate explanation as to why:

(a) no investigation was made concerning other employees, including management, failing to clean up visible contamination;

(b) such employees, if known (and logically, at least some *were* known) were not punished or admonished in any way; and

(c) the infraction of failure to use personal survey devices was so lightly regarded with reference to punishment vis a vis failure to clean up visible contamination.<sup>6</sup>

Additionally, the coincidence of a series of allegations by Mrs. English culminating in the March 1984 serious charges and various meetings directly connected with the March complaints with the banishment from the Chemet Lab is a factor that carries considerable weight. Further, the meetings, as testified through management's witnesses, came across as inquisitions to find charges that would "stick", not a true investigation into the validity of concerns over general laboratory safety. Mr. Lacewell was concerned about "entrapment" of Radiation Safety personnel and Mr. Sheely about "flagrant violation of work rules"; neither supervisor, as far as can be ascertained from the record, made any great effort to properly investigate Mrs. English's complaints on safety. The one rule that Mrs. English technically violated, it may therefore be inferred, was a pretext for getting rid of an employee who would not stop reporting violations to NRC. Notices at the plant and other information which Mrs. English understood as citing her duty to report violations, were apparently accepted by her at face value. Nothing in the record, briefs or in my research indicates that the

<sup>6</sup> Even taking into account the level V vs. level IV NRC designations, a five day suspension appears to have been the heaviest punishment dealt to anyone.

number and frequency of reports of violations to NRC excuses discipline against the employee reporting. Indeed, all violations are to be reported along with the employer's failure to take adequate corrective action.

*Defense Motions to Dismiss and/or For Summary Judgment:*

The motions are based on ERA sections 210(g) and 210(b).

The motion on timeliness was previously denied on November 1, 1984, with permission to bring it again after the close of the hearing.<sup>7</sup>

Section 210(g) of the ERA, 42 U.S.C.A. § 5851(g) provides:

Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or her employer (or employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended (42 U.S.C.A. § 2011, *et seq.*)

There was no evidence introduced to indicate that the failure to clean up a spill of uranyl would constitute a violation of any portion of the Atomic Energy Act. However, such a failure to act was considered a violation by NRC, and therefore could be considered a "requirement" as called for in the above statute. Assuming that such is the case, I do not consider that Mrs. English deliberately caused a violation under the circumstances of this case. Respondent contends on one hand, that Mrs. English's only recourse with regard to discovered violations was to report them to management, which she did to no avail, or to the NRC. On the other hand, Respondent would have Mrs. English continue to abate violations caused by others—namely, to clean up contamination

<sup>7</sup> Said Ruling and Order is incorporated herein by reference.

left by employees on prior shifts in violation of NRC requirements. GE cannot have it both ways. I find Mrs. English's statement credible that she had not caused the uranyl stain on her work table. Her outlining of the results of some other person's negligence and failure to clean up was in effect, at the same time, a notice to management and a warning to fellow workers of the visible contamination. Since Mrs. English had many times in the past cleaned up contamination caused by other persons in their preceding shifts, she was entitled to expect that someone other than she would clean up or call attention to the uranyl stain. Further, I found her credible in her testimony that she brought the stain and red tape to the attention of her immediate supervisor, Mr. Lacewell, as soon as he was available to observe the same first hand. Once the matter was brought to attention of management, an order should have issued to clean the stain. At least the Radiation Safety men should have been called in to view the situation. Mrs. English, as heretofore stated, knew that she could expect no credence to her complaints without tangible evidence. In demonstrating the malfeasance of others, she took the only means available to provide visible proof to support her past and immediate allegations. Her demonstration of same was used as a pretext for retaliatory action, and by way of Respondent's motion it is also used as a basis to defeat her claim. To allow the latter would be patently unfair and defeat the purpose of the Act. This was not an act done deliberately to invoke "whistle blower" protection, rather it was a means of reporting violations, albeit unorthodox. See S.Rep. No. 848, 95th Cong., 2d Sess. 30, reprinted in 1978 U.S. Code Cong. & Ad. News 7303, 7304; *Hochstadt v. Worcester Foundation For Experimental Biology*, 545 F.2d 222 (1st Cir. 1976).<sup>8</sup>

<sup>8</sup> In determining whether Claimant's conduct afforded an independent, nondiscriminatory basis for discharge, or whether it was protected activity, the court must determine whether Claimant's overall conduct was so generally inimical to Employer's interests

The motion based on section 210(g) is denied.

With respect to the defense motion under section 210(b), I find that Mrs. English's complaint was timely filed. Section 210(a) provides in pertinent part that "no employer. . . may discharge any employee or otherwise discriminate against any employee with respect to his. . . employment. . ." 42 U.S.C. § 5851(a). Section 210(b) provides that "any employee who believes that he has been discharged or otherwise discriminated against. . . may, within thirty days after such violation occurs, file. . . a complaint with the Secretary of Labor. . . alleging such discharge or discrimination." 42 U.S.C. § 5851(b).

Mrs. English alleged in her complaint continuing acts of discrimination by GE, as a result of her protected activities, from December 15, 1983, culminating in her transfer out of the Chemet Lab on March 15, 1984, and her discharge on July 30, 1984. GE contends that the thirty-day statute of limitations began to run on May 15, 1984. By letter of that date, Mrs. English was notified that as a result of her intentional failure to clean up contamination she would not be allowed to return to work in controlled areas, that her temporary reassignment would be extended for ninety days beginning May 1, 1984, that open placement positions would be reviewed in an effort to find suitable work for her, and that, in the event that she failed to secure permanent placement by July 30, 1984, she would be "involuntarily placed on lack of suitable work" status. Mrs. English alleges that GE's purported effort to find suitable work for her was merely another pretext in its efforts to remove her from the company.

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and so excessive as to be beyond the protection of the statute. The court must balance the setting in which the activity arises and the interests and motivations of both Employer and Employee. *Hockstadt, ibid.* at pages 229, 230 and 232.

GE's reliance on the cases of *Chardon v. Fernandez*, 454 U.S. 6 (1981) and *Delaware State College v. Ricks*, 448 U.S. 250 (1980) is misplaced. Those cases involved racial discrimination in the denial of tenure. In each of these cases, the complainant was denied tenure and given a one-year "terminal" contract. The court held that the proper focus is on the time of the discriminatory act, not the point at which the consequences of the act become painful. *Ricks*, 449 U.S. at 258; *Chardon*, 454 U.S. at 8. In said cases the fact of termination was not in itself an illegal act. Furthermore, neither complainant alleged any illegal acts subsequent to the date on which the decisions to terminate were made. In the instant matter, the statute specifies that discharge is one event upon which a complaint may be predicated, and is thus an illegal act in itself. Additionally, Mrs. English has established a continuing violation; "a series of related acts, one or more of which falls within the limitations period." *Valentino v. U.S. Postal Service*, 674 F.2d 56, 65 (D.C. Cir. 1982).

Mrs. English, therefore, did not need to file shortly after the first of the discriminatory acts, nor at any time prior to the discharge. If this were not so, an Employer could easily circumvent the statute by minor acts of discipline, followed by a discharge timed beyond the requisite time limit.

GE's motion, on both grounds, is denied.

Based on the foregoing discussion and the ruling on the motion, I make the following findings:

1. GE was an employer subject to the ERA (Act).
2. The Respondent employer discriminated against Complainant, by:
  - (a) banishing her from the Chemet Lab, and
  - (b) discharge from employment with GE

3. Said discrimination was motivated by Complainant's initiation of and participation in NRC proceedings investigating Employer's facility, specifically the Chemet Laboratory.

4. Respondent did not carry its burden to prove that the above discriminatory acts would have taken place, even if the protected activity of this Complainant had not taken place; i.e., the charge of "failure to clean up visible contamination" was a pretext.

5. Complainant, through her testimony and that of her witnesses (including psychologist Boyle) adequately established causal connection and the basis for compensatory damages and other relief provided by section 5851 of the Act.

6. The evidence of record considered for No. 5 finding sufficed without the necessity of evidence by an economist.

It is concluded that Complainant established a case of discrimination against Respondent, and in that regard the decision of the Administrator of the Wage and Hour Division is affirmed. With reference to the relief to be afforded, I have followed the guidelines of *DeFord, supra*. Accordingly, I must order the reinstatement of Mrs. English's former position since that is what the statute, as interpreted by the *DeFord* court, clearly sets forth. The balance, of the relief provided, also has been kept strictly to the bounds of the remedies outlined in the statute. *DeFord, supra*, at page 289.

#### *Attorneys' Fees and Costs*

The express statutory provision for Complainant's attorney fees is as follows in the ERA:

If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all

costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order is issued. 42 U.S.C. § 5851(b)(2)(B).

Complainant's attorneys have filed petition for fees and costs along with numerous supporting documents. The total of attorneys' fees and expenses claimed is \$543,660.95. Respondent filed a Memorandum in Opposition to said petition.

The determination on whether the items listed were "reasonably incurred" requires a logical starting point. Two cases, frequently cited in attorney fee matters, have been used to provide the outline for this subject.

In the *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3rd Cir. 1973) the "lodestar" approach was set forth. Under this analysis the number of hours spent and the manner that they were spent is first considered; next the reasonable hourly rate is fixed, considering the attorney's reputation and status (contingency aspects and quality may increase or decrease the "lodestar", which is the figure for hours times hourly rate). In *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), a race discrimination case, twelve factors were recited:

- (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill necessary to perform the legal services properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or circumstances; (8) the amount involved and the result obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the professional rela-

tions with the client; and (12) awards of similar cases.

Counsel for Respondent, in his memorandum suggested categories for the items of work to facilitate determining whether the hours were reasonably spent. I have kept this in mind. In *Copeland v. Marshall*, 641 F.2d 880, the court was upheld on the use of the "lodestar" approach, with a reduction of hours which were non-productive. In deciding which hours to reduce (and in some instances, the eliminating of total hours for certain items) I have carefully reviewed the *New York Gaslight Club v. Carey*, 100 S.Ct. 2024 (1980) and the later *Webb v. Board of Education of Dyer County*, 105 S.Ct. 1923 (1985). I consider the latter case as more pertinent to the case at hand. I incorporate by reference the reasoning of the *Webb* case in the following discussion.

As stated by the Sixth Circuit court in *DeFord, supra.*, a section 5851(a) case is a simple one requiring the Complainant to prove three elements (see page 8 of this decision). This case was not one that required hearings on interlocutory rulings of this administrative law judge in the U.S. District Court for D.C. or in the Court of Appeals for the D.C. Circuit. Such hours are deleted from consideration. Time spent in challenging the NRC determination was eliminated. Those items which lack specificity were not considered. It was not important that NRC find merit in each of Mrs. English's complaints, nor was the mode of NRC investigation material to this case (see Discussion, this Decision). The words "legal research" are assumed to relate to the subjects listed for the same date. I had the choice of eliminating all such references for being non-specific or making the above assumption; where there appears no reason to research the subject of a date in question, the "research hours" will be eliminated. It is regrettable the Complainant's attorneys spent so much time in re-arguing their case-in-chief in the documents for the attorney fee request without

devoting short specific explanation of matters researched, subjects of conferences and telephone calls, and subjects discussed with witnesses.

Mr. Ratner's hours will be discussed first. His hours are reduced by 1773 hours. Drastic reductions were made due to the non-specific quality of many items, the work on unrelated matters, excessive "legal research" and the plethora of conference hours. I allowed reasonable air travel time because the case necessitated travel from Mr. Ratner's office to Wilmington, N.C. I do not find merit to the argument that local counsel could have handled the case since GE is the largest single employer in Wilmington, and finding a local attorney would naturally be difficult. Respondent's attorneys were also from out of town. Reduction was further made on the basis that much of the time spent was for items of work that were clerical and administrative in nature. Further, as Respondent, suggests, the excessive hours per day are just not credible, considering the consecutive days claiming over 16 hours per day.

Mr. Ratner's experience and background, while impressive, does not convince this judge that it is worth \$185.00 per hour for this type of case. On the one hand, Mr. Ratner argues that he should receive credit for all hours on research because the field of law involving "whistle blower" cases was unfamiliar to him, but at the same time he expects the same fee as for his acknowledged field of expertise. The "lodestar" figure here would be 185. times the hours left, 341, totalling \$63,085.00. I have taken into account, however, the factors set forth in *Johnson, supra.* and the guidelines of *Lindy supra.* I found the most helpful were the factors for adjustment of the lodestar figure discussed in the *Lindy* case: (1) complexity and novelty of issues; (2) quality of work observed by the judge; (3) amount of recovery. As was stated above, in the discussion of *DeFord*, the case is a simple one with three basic elements to prove. Actually,

in this case, the only element of the three requiring more than minimal evidence was the connection between the discriminatory acts and the "protected activity". This could have been accomplished in far less time by the testimony of the Complainant, witness Malpass and one or two management witnesses. Witness Mossman was needed on rebuttal of the points made by the defense and the psychologist expert was needed to establish a portion of proof of damages. This court repeatedly admonished counsel to limit adversary hostilities and to avoid excessive direct examination and cross-examination. Additionally, far too much time was wasted on arguing minor points of evidence as well as service of subpoenas on unnecessary witnesses. The quality of Mr. Ratner's trial work observed by this judge would be rated as below average for the most part. Associate counsel Schiller elicited far more pertinent information in his examination in considerably less time than Mr. Ratner took for establishment of minor points. The time spent in producing material that was newsworthy for newspapers and television, may have been needed, as Mr. Ratner put it, to force GE into a position to settle the case, but it had no place during court-room hours.

The amount recovered, when the value of the back pay and fringe benefits are considered along with compensatory damages, was adequate in this case. The contingency factor is a plus for Complainant's attorney, but a minor one considering the facts of the case.

I find that total trial time for the Complainant's case, including rebuttal evidence should have taken three and one-half days. Time for the defense could not be controlled by Complainant's counsel, though cross-examination could have been reduced. Accordingly, I reduce the hourly rate to \$100.00 due to consideration of the three *Lindy* adjustment factors. Total fee allotted to Mr. Ratner: \$34,100.00.

Following the same format as in the reduction of Mr. Ratner's requested hours, I reduce Mr. Schiller's hours by 456.75, so that his total allowable hours total 366.75. The "lodestar" for Schiller, using the hourly rate requested would equal a total fee of \$45,843.75. However, in considering that Mr. Ratner was the lead attorney, along with the three factors of *Lindy*, I reduce the hourly rate to \$90.00. I found Mr. Schiller more effective than Mr. Ratner in examination of witnesses, less of a disruptive element in court, but much of his work duplicated that of Mr. Ratner's and his talents were wasted in clerical or administrative work. His total fee is therefore adjusted to \$33,007.50.

I find that the use of any other attorneys was unnecessary considering that *two* attorneys handled the defense of this case in excellent fashion. In many ways, considering the adverse finding by the Department of Labor administrator and the fact situation, the defense case was the more difficult to present. I therefore eliminate Mr. Nagle's fees entirely.

I also eliminate the cost of Ms. Jo G. Wilson's fees and expenses, as representing the ordinary costs of running a law office. Two paralegals were not needed. Ms. Zubrin's paralegal hours, through no fault of her's, nevertheless involved much research that had no materiality to this case. Some of her research pertained to proper subjects and her work in the courtroom saved time for the court as well as attorneys. Such work was needed specifically for this case. However, a good deal of Ms. Zubrin's work could be classified as straight secretarial, and I have deducted accordingly. I allow 60 hours representing the total allotted, for Ms. Zubrin's services after deductions, or \$1,200.00.

Mr. Jeannett's hours appear to be those of a legal secretary, and nothing is allowed for his time. (See *Hensley v. Echerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983)).

With reference to costs and expenses, I find that expert witnesses Mossman and Boyle were necessary but Respondent's counsel makes a valid point in stating that the hours for witness Mossman were excessive in view of 15 minutes of testimony. Even considering that the expert assisted Mr. Ratner in devising relevant questions of Respondent's witnesses, I find that much of Mr. Mossman's time was unnecessary for this case. All of the time allotted, during brief testimony, to setting out Mr. Mossman's standards vis a vis NRC's or those of GE appear barely relevant. Keeping in mind that an extra trip was necessitated due to unforeseen changes in scheduling of witnesses and that possibly eight hours were spent waiting to be called on the first day that his testimony was expected, I will allow a total of \$1,850.00 to include this witness' fees and expenses.

The other items of "expense" and costs are outrageous with reference to Mr. Ratner. Expenses listed for Mrs. English are not of the type allowable under the statute and regulations, therefore none are allowed. Expenses for Schiller, though also excessive, appear much more in line. I will allow the costs of reasonable photocopying, some subpoena service charges and other normal costs plus a reasonable amount towards airfare and hotel charges for the two attorneys and Ms. Zubrin, taking into account that I consider the length of the trial as unreasonable, and much of the overhead expense as relating to immaterial matters. The total allowable for reasonable costs and expenses is \$2,850.00 (additional to attorney, paralegal and Professor Mossman's expense). This includes Dr. Boyle's time, in court only. Anything over and above that amount, I find to be unnecessary due to the excessive trial time used, the immaterial motions, the proceedings in other courts and the excessive document production. No other items, whether termed fees, expenses or costs are allowed, though all documents on fees, expenses and costs have been considered.

## ORDER

1. Respondent General Electric Company is to take affirmative steps to cease discriminatory acts against Complainant.

2. Complainant is to be reinstated to her former position together with compensation for any back pay loss calculated from the time of the last pay period plus interest at a rate per annum equivalent to the coupon yield of the average accepted auction price of the last 52-week U.S. Treasury bills. Such interest shall be payable from the date of Complainant's cessation of employment to the date that such back pay is actually paid. Any rate increase since the cessation of employment is to be calculated into the back pay compensation.

3. Complainant is to be reinstated as to terms, conditions and privileges of her employment so as to make her whole for any such losses suffered by cessation of employment.

4. Respondent is entitled to set off any contributions owed to savings plans formerly participated in by Complainant, if such employee contributions ceased during her time off employment, and in order to bring Complainant up to date on any such plan.

5. Compensatory damages are awarded, and are intended to cover past and future medical expenses (not already covered under any employee Health and Accident plan which is to be fully reinstated pursuant to order No. 3 above) and as recompense for the humiliation and mental suffering of the Complainant due to Respondent's discriminatory acts. Said compensatory award is \$70,000.00.

6. Respondent is to pay Complainant's attorneys fees and expenses, as follows:

- (a) A fee for legal services to Mozart Ratner, Esq. of \$34,100.00.

- (b) A fee for legal services to Arthur M. Schiller, Esq. of \$33,007.50.
- (c) A fee for para-legal services of \$1,200.00.
- (d) Expert witness fees and expenses for Professor Mossman of \$1,850.00.
- (e) All other costs and expenses not covered above, including Dr. Boyle's courtroom appearance fee, in the amount of \$2,850.00.

The aggregate amount of the above costs and expenses allowed to Complainant is \$73,007.50.

/s/ Robert J. Brissenden  
ROBERT J. BRISSENDEN  
Administrative Law Judge

Dated: Aug. 1, 1985  
San Francisco, CA

RJB:scm

# NUCLEAR REGULATORY COMMISSION

## GENERAL ELECTRIC COMPANY

Wilmington, North Carolina Facility

Docket No. 70-1113

### ISSUANCE OF DIRECTOR'S DECISION UNDER 10 CFR 2.206

Notice is hereby given that the Deputy Executive Director for Nuclear Materials Safety, Safeguards, and Operations Support has granted in part and denied in part a petition under 10 CFR 2.206 filed by Anthony Z. Roisman and Mozart G. Ratner on behalf of Vera M. English (Petitioner). In her petition, Mrs. English requested imposition of a civil penalty in the amount of \$40,635,000 upon General Electric (GE), plus \$37,500 per day for every day after April 6, 1987, that GE does not take corrective action, and imposition of a license condition upon GE requiring the Licensee to fully compensate Mrs. English for her economic losses in the past and future resulting from GE's alleged discrimination, for medical expenses entailed as a result of the alleged discrimination, for expenses incurred in "fighting GE", and for "physical and mental pain she has endured" as a result of GE's actions.

The Petitioner's request that enforcement action be taken against GE has been granted. As a result of this decision, a Notice of Violation and Proposed Imposition of Civil Penalty in the amount of \$20,000 is also being issued. However, the Petitioner's requests that the NRC impose a civil penalty in the amount of \$40,635,000 plus \$37,500 per day for each day after April 6, 1987 and that the NRC impose a license condition upon GE requiring the Licensee to compensate Mrs. English for her expenses and losses are denied. Furthermore, the Petitioner's re-

quest as set forth in her December 13, 1984 petition that the NRC take enforcement action against GE based upon certain other alleged instances of wrongdoing is also denied.

The reasons for this decision are fully described in the "Director's Decision Under 10 CFR 2.206," issued on this date, which is available for public inspection in the Commission's Public Document Room, 1717 H Street, NW, Washington, DC 20555.

FOR THE NUCLEAR REGULATORY COMMISSION

/s/ Hugh L. Thompson Jr.  
 HUGH L. THOMPSON, JR.  
 Deputy Executive Director for Nuclear  
 Materials Safety, Safeguards and  
 Operations Support

Dated at Rockville, Maryland  
 this 13th day of March 1989